San Francisco
Law Library

436 CITY HALL

No. 152597

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

No. 13695

United States
Court of Appeals
For the Ninth Circuit.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-13-53

No. 13695

United States
Court of Appeals
For the Ninth Circuit.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-13-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS,
United States Attorney,

1017 U. S. Court House,
Seattle 4, Washington,

Attorney for Appellant.

JOHN E. BELCHER,
Asst. United States Attorney,

1017 U. S. Court House,
Seattle 4, Washington,

Attorney for Appellant.

EDWARDS E. MERGES,

1510-1511 Smith Tower,
Seattle, Washington,

Attorney for Appellee.

In the United States District Court for the Western District of Washington, Northern Division

No. 3010

LEE GNAN LUNG, by His Next Friend, LEE KUT,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

COMPLAINT

Comes Now Lee Gnan Lung, by his next friend, Lee Kut, and for cause of action against the defendant, complains and alleges as follows:

I.

That the plaintiff, Lee Gnan Lung, is a citizen of the United States and brings this action through his father and next friend, Lee Kut, also a citizen of the United States and a resident of Seattle, King County, Washington.

II.

That the defendant, Dean G. Acheson, is the duly appointed, qualified and acting Secretary of State of the United States of America; that the American Consul General at Hong Kong is an officer of the United States and an executive official of the Department of State of the United States, acting

under and by the direction of the defendant, Dean G. Acheson, as Secretary of State.

III.

That the jurisdiction of this action is conferred upon this Court by Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 3 U.S.C. 903.

IV.

That the plaintiff, Lee Gnan Lung, was born in China at Wah Lum Village, Hoy Shan District, on September 15, 1926, (Chinese date) and is at the present time temporarily residing in Hong Kong, China, awaiting the issuance of a travel document to enable him to come to the United States.

V.

That the plaintiff, Lee Gnan Lung, is a citizen of the United States under Section 1993 of the Revised Statutes, 8 U.S.C. 6 First Edition; and that plaintiff became a citizen of the United States at birth pursuant to the act of May 24, 1934, 8 U.S.C. 6, First Pocket Edition, as amended by Section 201(g) of the Nationality Act of 1940, 8 U.S.C. 601.

VI.

That Lee Kut, the father of plaintiff, is also a citizen of the United States, as aforesaid, and that his citizenship has been recognized and conceded by the Immigration Service at the Port of Seattle, Washington, on several occasions and that the

permanent residence of the plaintiff's father, Lee Kut, is the City of Seattle, where he is engaged in the laundry business, and the plaintiff has and claims his permanent residence in the City of Seattle, King County, Washington in the Northern Division of the Western District of Washington, where the permanent residence of his said father is located and the plaintiff claims the right of entering the United States of America as a national and citizen of said nation.

VII.

That the plaintiff's father, Lee Kut, was legally and lawfully married to the plaintiff's mother, Lew Shee, on November 28, 1925, (Chinese date) and that the plaintiff was the lawful issue of said marriage.

VIII.

That in February of 1951 or approximately one year ago, the plaintiff's father, Lee Kut, caused to be prepared an identification affidavit stating his relationship to the plaintiff and all the particulars concerning him and that said identification affidavit was prepared for the purpose of securing from the American Consul General in Hong Kong, a travel document to enable the plaintiff to travel to the United States; and that said identification affidavit was filed with said American Consul shortly thereafter so the plaintiff would be eligible to purchase transportation to the United States in order to apply for admission here under the immigration laws as a citizen thereof, but that the Consul failed

and neglected to take any action upon said application and on October 11, 1951, wrote a letter, stating that plaintiff had been interviewed at the office of the American Consul but had not presented sufficient evidence to enable the Consul to issue him a final document and that it was indefinite when any travel document would be issued because there were approximately 1800 cases ahead of the plaintiffs but that there is in truth and in fact no good reason for such delay because the plaintiff has submitted adequate and competent evidence of his citizenship and right to come to the United States and that the American Consul, upon information and belief of the plaintiff, has no intention of issuing the plaintiff a travel document and that a year's time is an unreasonable delay inasmuch as the plaintiff's right to a travel document could be determined on a basis of the affidavits submitted and that in any event, the plaintiff is subject to examination by the United States immigration authorities but by reason of the American Consul's action aforesaid, the plaintiff has been stoped from coming to the United States and from applying to and presenting his proof to the Immigration Service at a port of entry in the United States, and that the said action of the American Consul has been referred or appealed to the Secretary of State upon information and belief of plaintiff. That plaintiff is informed and believes and therefore alleges that no action will be taken upon said application and that if any action is taken on it, it will be unfavorable, and that plain-

tiff has no other remedy at law or otherwise except the present one.

IX.

That the plaintiff is a citizen of the United States as aforesaid, claims United States nationality of citizenship and brings this action in good faith and on a substantial basis.

Wherefore, plaintiff prays for an order and judgment of this court as follows:

1. That an order, directed to the defendant, Dean G. Acheson, issue to provide that the plaintiff be granted a certificate of identity and/or travel document in order that he may be able to obtain transportation to the United States and be admitted under bond in the sum of Five Hundred Dollars ($500.00) for the purpose of prosecuting his claim of citizenship in this court.

2. That a decree be entered herein adjudging the plaintiff to be a citizen of the United States.

3. That the plaintiff be granted such other and further relief as may be just and equitable in the premises.

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

Lee Kut, being first duly sworn, on oath deposes and says: That he is the next friend of the plain-

tiff in the above-entitled action; that he has read the foregoing complaint, knows the content thereof and believes the same to be true.

/s/ LEE KUT.

Subscribed and sworn to before me this 18th day of February, 1952.

/s/ EDWARDS E. MERGES,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed February 19, 1952.

[Title of District Court and Cause.]

MOTION AND AFFIDAVIT FOR AN ORDER TO SHOW CAUSE

Comes Now Lee Kut, the father and next friend of Lee Gnan Lung, the plaintiff in the above-entitled cause, and respectfully moves the Court for an order directed to defendant, Dean G. Acheson, to show cause, if any he may have, why he should not issue forthwith a Certificate of Identity or travel document to Lee Gnan Lung, to enable the said Lee Gnan Lung to obtain transportation and admittance to the United States, or that the defendant, the said Dean G. Acheson, be held in contempt of court for his failure and refusal to issue such document.

This motion is based upon the records and files herein, upon the affidavit of Lee Kut, and upon Section 503 of the Nationality Act of 1940, 3 U.S.C. 903.

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

Lee Kut, being first duly sworn, on oath deposes and says: That he is a citizen of the United States and has brought the above-entitled action on behalf of his son, Lee Gnan Lung; that said action was filed in the above-entitled court on or about February 19, 1952, served on the United States of America by serving J. Charles Dennis, United States Attorney, on or about February 20, 1952, and that immediately thereafter, in accordance with Sec. 503 of the Nationality Act of 1940, a certified copy of said complaint, containing the sworn application that the claim of nationality presented in the action was made in good faith, was served upon and delivered to the American Consul in Hong Kong, and that upon information and belief of this affiant, the said American Consul, the duly authorized representative of the defendant herein, failed and refused to issue any travel documents as provided for in the said Nationality Act and has done nothing toward securing or issuing such travel document and has instructed affiant's son to wait indefinitely for the issuance of said travel document.

This affidavit is made for the purpose of compelling and requiring defendant to issue a travel document as provided by law in order that this affiant's son, the said Lee Gnan Lung, may be enabled to get transportation and come to the United States for a court determination of his nationality status and may be admitted to the United States under said certificate, all as provided for in the Nationality Act of 1940, and upon further information and belief of this affiant, unless the defendant is ordered to issue such a travel document, he will fail to do so and stall indefinitely and that this affiant and his said son will be denied the right of a judicial hearing as provided by law.

/s/ LEE KUT.

Subscribed and sworn to before me this 13th day of March, 1952.

[Seal] /s/ EDWARDS E. MERGES,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed March 21, 1952.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This Matter having come on regularly to be heard before the undersigned Judge of the above-entitled court upon the motion for show cause order presented by the plaintiff in the above-entitled cause,

and it appearing to the court from the affidavit of plaintiff that good cause exists and that a show cause order should be issued herein, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the defendant, Dean C. Acheson, be and appear before the Honorable William J. Lindberg, one of the Judges of the above-entitled court on the 28th day of April, 1952, at 10 o'clock a.m., then and there to show cause, if any he may have, why he should not issue forthwith a Certificate of Identity or travel document to the plaintiff herein to enable said plaintiff to obtain transportation and be admitted to the United States, and obtain thereby a judicial hearing upon the question of his citizenship, all in accordance with Sec. 503 of the Nationality Act of 1940; and it is further

Ordered, Adjudged and Decreed that the said defendent be and appear in court at said place and time to further show cause why he should not be held in contempt of court for his failure and refusal to issue such travel documents as are provided for by law in such cases.

Done in Open Court this 21st day of March, 1952.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

[Endorsed]: Filed March 21, 1952.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Dean C. Acheson, Secretary of State of the United States of America, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and John E. Belcher, Assistant United States Attorney for the same district, and for return to the order to show cause herein shows:

I.

That a copy of the order to show cause herein was promptly forwarded to the Secretary of State through the Attorney General of the United States and by teletype April 17, 1952, the Attorney General states:

> "Lituated April 4, 1952, Re Lee Gnan Lung v. Acheson. State Department Advised Us Plaintiff Has Not Appealed to Secretary for Certificate and Therefore Administrative Remedies Have Not Been Exhausted."

And in confirmation, Secretary of State has advised by letter:

> "* * * case Lee Gnan Lung (Civil Action 3010) * * * application being processed by Consul General in Hong Kong at present time."

II.

That because of the pendency of plaintiff's application before Consul General, Hong Kong, and there being no refusal to process the same, the action

herein is premature, and there having been no appeal to the Secretary of State, plaintiff has not exhausted his administrative remedy.

Wherefore, defendant prays that plaintiff's action be dismissed and the rule to show cause herein be discharged, or in the alternative this action be abated.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed April 25, 1952.

[Title of District Court and Cause.]

ORDER DIRECTING DEFENDANT TO ISSUE TRAVEL DOCUMENT IN ACCORDANCE WITH SECTION 503 OF THE NATIONALITY ACT OF 1940

This Matter having come on regularly to be heard before the undersigned Judge of the above-entitled court upon an order to show cause heretofore issued herein, ordering and directing the defendant, Dean C. Acheson, to show cause, if any he may have, why he should not issue forthwith certificate of identity or travel document to allow the plaintiff herein to obtain transportation and come to the United States to have a judicial hearing upon the question of his

citizenship in accordance with Section 503 of the Nationality Act of 1940; and it appearing to the Court that said order to show cause was duly served upon the defendant herein and that said defendant has made his return and has appeared in court through the Honorable John E. Belcher, Assistant United States Attorney; and the Court having read the motion and affidavit made on behalf of the plaintiff and having examined the exhibits introduced and it appearing to the Court that suit under the Nationality Act of 1940, Section 503 thereof, has been pending herein and that evidence of said suit has been properly presented to the defendant and his agents, all in accordance with law, and that the plaintiff's request for a travel document has long been pending, that no travel document has been issued and that under and by reason of Section 503 of the Nationality Act of 1940 the plaintiff is entitled to the issuance of a travel document instanter to enable him to come to the United States and have a judicial hearing on the question of his citizenship in accordance with the said Nationality Act, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the defendant and/or his diplomatic or consular officer in Hong Kong, China, issue to the plaintiff a certificate of identity, stating plaintiff's nationality status is pending before the court and permitting him to be admitted to the United States. Such certificate shall be issued immediately upon receipt of a cer-

tified copy of this order by the defendant and without delay.

Done in Open Court this 5th day of May, 1952.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

Approved as to form and entry:

/s/ JOHN E. BELCHER,
Asst. U. S. Attorney.

[Endorsed]: Filed May 5, 1952.

[Title of District Court and Cause.]

MOTION FOR STAY OR RECALL OF ORDER

Comes now Dean C. Acheson, Secretary of State of the United States of America, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and John E. Belcher, Assistant United States Attorney for the same district, and respectfully moves this honorable court for an order staying its order heretofore entered herein directing defendant to issue a travel document to plaintiff to enable plaintiff to come to the United States for the purpose of prosecuting the above-entitled action, or in the alternative to revoke the same.

This motion is based upon the records and files

herein, and upon the affidavit of John E. Belcher, attached hereto and made a part hereof.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

United States of America,
Western District of Washington,
Northern Division—ss.

John E. Belcher, being first duly sworn, on oath, deposes and says: That he is a duly appointed, qualified and acting Assistant United States Attorney for the Western District of Washington, and as such, has at all times been in active charge of the defense of the above case.

That heretofore and on the 5th day of May, 1952, there was entered herein an order directed to the defendant reading:

> "Ordered, Adjudged and Decreed that the defendant and/or his diplomatic or consular office in Hong Kong, China issue to the plaintiff a certificate of identity, stating plaintiff's nationality status is pending before the court and permitting him to be admitted to the United States. Such certificate shall be issued immediately on receipt of a certified copy of this order by defendant and without delay."

Affiant states that a copy of said order was forwarded by him to the Attorney General of the United States, who, under date of May 23, 1952, instructed as follows:

> "We therefore suggest that you immediately file a motion to dismiss the complaint on the ground that it does not set forth a cause of action under Section 503 of the Nationality Act, the only basis for the Court's jurisdiction. In further support of this motion, you can point out to the court that it appears from the face of the complaint that there are many Chinese claiming to be citizens who are ahead of plaintiff on the passport interview list at Hong Kong and that it would be unfair to them to have plaintiff given a preference, and also unfair to those who follow proper procedure by exhausting their administrative remedies.
>
> "In connection with the motion to dismiss, we suggest that you also request the court to stay its order of May 5, directing the issuance of a certificate of identity pending determination of the motion. * * *"

Affiant further states that he has been advised by R. B. Shipley, Chief, Passport Division, Department of State, that on May 1, 1952, the American Consulate General at Hong Kong had reported that the citizenship claim of Lee Gnan Lung was initiated March 14, 1951, and bears No. 4423; that there were approximately 1200 similar cases initiated at earlier dates which were being processed in turn

and which precede this case on the appointment schedule; that the evidence of identity submitted by the applicant in support of his claim had been reviewed and it was determined to be inadequate to permit immediate documentation and that the Consulate General therefore contemplated the usual examination and personal interview in the applicant's normal turn.

Affiant further states that in all fairness to all concerned, especially to those persons, who for financial reasons are unable to resort to civil actions, and to attorneys who have advised their clients to wait the orderly administrative processes, that preference in travel permits was properly denied.

/s/ JOHN E. BELCHER.

Subscribed and sworn to before me this 2nd day of July, 1952.

[Seal] /s/ TRUMAN EGGER,
Chief Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed July 2, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE

State of Washington,
County of King—ss.

Edwards E. Merges, being first duly sworn, on oath deposes and says: that he is attorney for the plaintiff in the above-entitled cause and that heretofore there was issued herein an Order Directing Defendant to Issue Travel Documents in Accordance With Section 503 of the Nationality Act of 1940; that said order specifically directed the defendant or his counsel or officer in Hong Kong to issue to the plaintiff a Certificate of Identity to permit plaintiff to come to the United States and attend a hearing upon the question of his citizenship; that this affiant forwarded a copy of the court's order to Mrs. R. B. Shipley, Chief of the Passport Division, Washington, D. C.; and in addition thereto turned over copies of said order to the marshal for service upon the defendant; and in addition caused to be presented to the American Consul in Hong Kong copies thereof; that the defendant and his consular representatives refused to comply with the order of the court, and on May 22, 1952, affiant sent the following telegram to Mrs. R. B. Shipley: "re Lee Gnan Lung, reference my letter dated May 16 and enclosure, plaintiffs advise U. S. Consul in Hong Kong refuses to obey court order. Please advise your position." That said Shipley failed and neglected to answer or reply in any way

to by reason of the matters and things herein set forth, the defendant has failed and refused to obey the order of the court and should be held in contempt; and that defendant's motion for stay of order has been denied; and that plaintiff is entitled to have defendant comply with the law and issue travel documents as the law compels him to do, and that defendant should be held in contempt for his failure so to do.

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

Subscribed and sworn to before me this 14th day of July, 1952.

[Seal] /s/ IRVING CLARK, JR.,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This Matter having come on regularly to be heard before the undersigned judge of the above-entitled court, and the court having read the affidavit of Edwards E. Merges, attorney for the plaintiff, and it appearing from said affidavit and from the records and files in this cause that the defendant has failed and refused and continues to fail and refuse to comply with the specific order of the court made on

the 5th day of May, 1952, which said order directed issuance of travel documents to the plaintiffs, and it further appearing to the court that the defendant should be ordered to appear before this court to show cause why he should not be held in contempt; now, therefore, it is hereby

Ordered, Adjudged, and Decreed that the defendant, Dean C. Acheson, be and he hereby is directed to be and appear before the undersigned judge of the above-entitled court on the 4th day of August, 1952, at 2 p.m., then and there to show cause, if any he may have, why he should not be held in contempt of court for his failure and refusal to obey the order of this court made on the 5th day of May, 1952, and directing said defendant to issue travel documents to the plaintiff in accordance with Section 503 of the Nationality Act of 1940.

Done in Open Court this 14th day of July, 1952.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ EDWARDS E. MERGES,
Attorney for Plaintiffs;

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

ORDER UPON MOTION TO STAY

This Matter having come on regularly to be heard before the undersigned judge of the above-entitled court, and the court having listened to the arguments of the defendant upon his motion for a stay of the order heretofore issued herein directing issuance of travel permit, and the court having fully considered the facts and the law in the premises, and the arguments of counsel, now, therefore, it is hereby

Ordered, Adjudged, and Decreed that the defendant's said motion be and it is hereby denied.

Done in Open Court this 14th day of July, 1952.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

Approved as to form and entry:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on regularly to be heard before the undersigned Judge of the above-entitled

court upon a petition filed herein by the plaintiff, Lee Gnan Lung, under Section 503 of the Nationality Act of 1940, Title 8 U.S.C.A. 903; and the defendant having filed an appearance but no answer to the petition of plaintiff and it having been stipulated in open court that the defendant may be considered to generally deny the allegations contained in said petition; and it appearing to the court that the plaintiff is not personally present in court by reason of the failure of the defendant to issue him a travel document to enable him to come to the United States and attend a trial upon the question of his citizenship in accordance with the provisions of Section 503 of the Nationality Act; and the court having held that the matter should proceed to trial in the absence of the plaintiff, Lee Gnan Lung, and witnesses thereupon having been sworn and having testified in support of the allegations of the petition and the plaintiff then having rested and the defendant having made oral argument and having thereupon moved the court to order a blood examination of the plaintiff and the court having denied said motion upon the grounds that the motion was neither timely nor warranted by the facts and circumstances as shown in the case, and the court having thereupon considered the matter and the evidence introduced and the arguments of counsel and being fully advised in the premises, now, therefore, makes and enters the following

Findings of Fact

I.

That Lee Kut, the father of the plaintiff, Lee Gnan Lung, is a citizen of the United States, an honorably discharged veteran of World War II and a resident of Seattle, King County, Washington.

II.

That the defendant is the duly appointed, qualified and acting Secretary of State of the United States of America.

III.

That the plaintiff, Lee Gnan Lung, was born in China at Wah Lum Village, Hoy Shan District, on September 15, 1926, and was the lawful issue of the marriage of Lee Kut and his wife, Lew Shee, who is now deceased.

IV.

That in February of 1951 the plaintiff's father, Lee Kut, caused to be prepared an identification affidavit, stating his relationship to the plaintiff and all the particulars concerning the same and that said affidavit was prepared for the purpose of securing from the American Consul at Hong Kong a travel document to enable the plaintiff to travel to the United States; and that said identification affidavit was filed with the American Consul but that the American Consul failed to grant the plaintiff any travel document.

V.

That it was not possible for the plaintiff to be personally present in court by reason of the failure

of the defendant to issue plaintiff a travel document to enable him to come to the United States.

VI.

That the plaintiff's paternal grandmother, his paternal uncle, paternal cousin and other witnesses have all testified affirmatively to the relationship in question and the court finds that Lee Gnan Lung is the foreign born blood son of Lee Kut, born in lawful wedlock.

From the foregoing Finds of Fact the court makes the following

Conclusions of Law

I.

That the plaintiff is entitled to the entry of a decree adjudging him to be a citizen of the United States in accordance with Section 503 of the Nationality Act of 1940.

Done in Open Court this 22nd day of October, 1952.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

Approved as to form and entry:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed October 22, 1952.

Entered October 23, 1952.

United States District Court, Western District of Washington, Northern Division

No. 3010

LEE GNAN LUNG, By His Next Friend, LEE KUT,

Plaintiff,

vs.

DEAN C. ACHESON, Secretary of State of the United States of America,

Defendant.

DECREE AND ADJUDICATION OF CITIZENSHIP

This Matter having come on regularly to be heard before the undersigned Judge of the above-entitled court upon a petition filed herein by the plaintiff, Lee Gnan Lung, under Section 503 of the Nationality Act of 1940, Title 8 U.S.C.A. 903; and the defendant having filed an appearance but no answer to the petition of plaintiff and it having been stipulated in open court that the defendant may be considered to generally deny the allegations contained in said petition; and it appearing to the court that the plaintiff is not personally present in court by reason of the failure of the defendant to issue him a travel document to enable him to come to the United States and attend a trial upon the question of his citizenship in accordance with the provisions of Section 503 of the Nationality Act; and the court having held that the matter should

proceed to trial in the absence of the plaintiff, Lee Gnan Lung, and witnesses thereupon having been sworn and having testified in support of the allegations of the petition and the plaintiff then having rested and the defendant having made oral argument and having thereupon moved the court to order a blood examination of the plaintiff and the court having denied said motion upon the grounds that the motion was neither timely nor warranted by the facts and circumstances as shown in the case, and the court having thereupon considered the matter and the evidence introduced and the arguments of counsel and being fully advised in the premises, now, therefore doth hold and determine:

That Lee Gnan Lung, the plaintiff in the above-entitled cause is a citizen of the United States by reason of being the foreign born son of a United States citizen, Lee Kut, and the court finds and declares by this decree that the said Lee Gnan Lung as such citizen is entitled to all the rights and privileges appertaining to such citizenship, including his right to enter and remain in the United States.

For the purpose of identification there is attached to this decree under the seal of this court a picture of the said Lee Gnan Lung which is a true and correct likeness of him at the present time.

Done in Open Court this 22nd day of October, 1952.

[Seal] /s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

Approved as to form and entry:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed October 22, 1952.

Entered October 23, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Lee Gnan Lung, Plaintiff, and Edwards E. Merges, his attorney

You and Each of You will please take notice that Dean C. Acheson, defendant above-named hereby gives notice of appeal to the Court of Appeals for the Ninth Circuit from that certain judgment and decree entered in the above-entitled cause on the 22nd day of October, 1952, and from each and every part thereof.

Dated this 18th day of December, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed December 18, 1952.

[Title of District Court and Cause.]

POINTS TO BE RELIED UPON ON APPEAL

Comes now Dean C. Acheson, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and John E. Belcher, Assistant United States Attorney for the same district, and designates the following points to be relied upon on the appeal herein:

The Court erred in the following particulars:

1. The Court erred in refusing to dismiss plaintiff's complaint for lack of jurisdiction.

2. The Court erred in its order directing defendant to issue to plaintiff a travel order entitling plaintiff to travel to the United States to prosecute this action.

3. The Court erred in denying defendant's motion to stay its order for travel document.

4. The Court erred in denying defendant's motion for a blood-grouping test.

5. The Court erred in holding the evidence sufficient to establish American citizenship in plaintiff.

6. The Court erred in entering a decree declaring plaintiff to be an American citizen.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed February 2, 1953.

[Title of District Court and Cause.]

STIPULATION AND ORDER TRANSFERRING EXHIBITS

It Is Hereby Stipulated by and between the parties herein, through their respective counsel, that the original exhibits introduced and admitted in evidence herein be transmitted by the Clerk of this Court to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Dated this 28th day of January, 1953.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

/s/ EDWARDS E. MERGES,
Attorney for Plaintiff.

Order

In conformity with the foregoing stipulation, the Clerk of this Court is hereby directed to forthwith transmit to the Clerk of the Court of Appeals for the Ninth Circuit all exhibits admitted in evidence in the above-entitled cause in connection with the appeal herein.

Done in Open Court this 2nd day of February, 1953.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed February 2, 1953.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3010

LEE GNAN LUNG, By His Next Friend, LEE KUT,

Plaintiff,

vs.

DEAN C. ACHESON, Secretary of State of the United States,

Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS

had in the above-entitled and numbered cause before The Honorable William J. Lindberg, United States District Judge, at Seattle, Washington, commencing at 10:00 o'clock a.m., on the 22nd day of October, 1952.

Appearances:

EDWARDS E. MERGES, ESQUIRE,
Appeared on Behalf of the Plaintiff.

JOHN E. BELCHER, ESQUIRE,
Assistant United States Attorney, Western District of Washington,

Appeared on Behalf of the Defendant.

Whereupon, the following proceedings were had, to wit:

Proceedings

The Court (After conference with respective counsel relative to trial dates for other causes):

We will then proceed with Number 3010, Lee Gnan Lung vs. Acheson.

Mr. Merges: The background of this matter is —a brief summary may be—helpful to the Court.

The background of this matter is that the applicant's father in this case is a resident of Seattle. He operates a wholesale laundry business here with his brother called the Star Laundry. They do laundry in wholesale quantities for various hotels in the city.

As a result of a trip to China in 1925, there was born to him a son named Lee Gnan Lung.

The immigration authorities have written a letter, or summary, of the investigation of the file of the applicant's father, which we will ask be read into the record, in order to save time, in which the im-

migration people advise that the applicant's father was in China in time to make his paternity of this boy possible, and also this file shows that upon examination by the immigration officers upon his return to the United States from China—the boy was born after he arrived here, but, upon a subsequent examination in some immigration proceeding, I don't remember which it was, he mentioned this boy.

The affidavit was filed by Lee Kut, who is the father, [3*] in March, '51.

After the filing of the affidavit, the following October, we wrote to the American Consul in an endeavor to get a decision in the case without any success and there was considerable correspondence back and forth between my office and the Consul's office in an endeavor to get the matter determined; that is, the right of this boy to have a travel document allowed, and we were unsuccessful in doing so.

The Government made a motion in this case. We secured a show cause order and the Court entered an order directing issuance of a travel document.

The Government resisted that rather strenuously and briefs were filed and the travel document was never issued.

The Government then, in July of this year, made a motion to stay the order directing issuance of the travel document which was denied on the 14th of July, 1952.

We then made a motion to hold the defendant,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Dean Acheson, in contempt of court for his failure to comply with the order of the Court, and the Court indicated at first that he felt that the defendant was in contempt of Court and later the Court indicated that he had deviated from that decision and felt serious doubts as to whether or not he had jurisdiction to hold the defendant in contempt of court, and directed him to issue a travel document.

The Court: That was probably in accordance with the decision of Judge Goodman.

Mr. Merges: Yes. The Court was impressed [4] with the decision of Judge Goodman.

The Court made no ruling but just indicated his feeling at the time.

So that I requested leave to present the matter by way of brief and detailed argument on the law and about that time Mr. Belcher, the Court, and I had some discussion in court about the matter of holding the Secretary of State in contempt and we decided that, perhaps, the case could be tried in absentia; that is, without the applicant being here.

Your Honor will recall from Judge Goodman's opinion, Judge Goodman felt even though the court didn't have jurisdiction that it might well have jurisdiction to order the applicant to be produced as a witness.

So it was concluded that rather than to go into the matter at this time and in this case of the Court's jurisdiction to hold the defendant in contempt and to order the issuance of a travel document it was decided that we would proceed with the trial and offer what evidence we had and that the

Court would then go on and make what order he felt was proper in view of the circumstances.

The Court: And further proof might be put in.

Mr. Merges: Yes, whatever proof in the case indicated.

The Court: By the way, is that opinion or decision of Judge Goodman on appeal?

Mr. Merges: Not that I know of, your Honor. I am [5] in communication with those parties in San Francisco, the various attorneys in these cases, and I asked them to inform me what the rulings are in various cases down there and they have not yet advised me whether or not that case is being appealed.

The Court: Was that an interlocutory decision?

Mr. Belcher: Yes.

Mr. Merges: That was an interlocutory order; then that reminds me of whether or not those orders can be appealed.

The Court: Assuming the case proceeded, then in due course that order would be reviewable upon appeal.

Mr. Merges: Evidently.

The Court: Yes.

Mr. Merges: There hasn't been any appeal from that order and, as I recall now, there is a serious question of whether you can appeal from it.

The case has not been, sofar as I know, finally determined on the merits one way or another. So, I guess that point is still up in the air.

However, we felt that possible in this case—at

least I felt that way—that due to the fact that in this case we are fortunate enough to have a lot of witnesses that perhaps that question need not be determined in this case.

All these cases, of course, are not going to be that way. We are going to have some of them where we don't have much more than the father and, possibly, one other relative because that is [6] just the way it is in some families.

However, in this case we do have a lot of witnesses and I want to put them on.

Now, the Government has already raised the question in this case about necessity of appeal, which the Court determined against the Government.

So, as I understand it, that question has been resolved.

The Court: That is the question of appeal?

Mr. Merges: Yes, whether or not it is necessary for them to appeal.

The Court: Before filing an action?

Mr. Merges: Yes, sir. The question in this case is that the Consul has just not acted one way or another about it and this affidavit was filed back in February, 1951.

Now, the Consul has written to Mr. Belcher and Mr. Coleman a letter that they were kind enough to show me indicating that they were still thinking about this case but that by reason of lack of evidence that they were going to recommend that the case be turned down.

Well, perhaps there is lack of evidence in Hong

Kong by reason of the fact that the grandmother and grandfather are dead. The boy's mother is dead. And so, there is not anybody very much to testify there, but we have most of the other members of the family here.

There is no feasible way, of course, that we can ship [7] them over to China to testify before the Consul and, inasmuch as the Consul has already stated in his letter that he will probably make an unfavorable recommendation, it is certainly a foregone conclusion that the authorities in Washington are going to follow his recommendation that any further delay in this case would be of no consequence and, in any event, as I understand the law, in the determination of this court the court has jurisdiction.

We are going to offer the applicant's father, the applicant's paternal uncle, the applicant's grandmother, the wife of the applicant's cousin, and a couple of other witnesses who have been in China and visited his home.

I had a family group picture. I asked these parties if they had any group picture and they said "yes," they had one at home, and they brought a great big picture they had on the wall at home and I found, however, that this picture was a composite picture wherein different people had been set in. Of course, by reason of the fact they had the picture at home and produced it only at my request, I was satisfied that it was not made for any ulterior motives but, inasmuch as it was a composite pic-

ture, I shall not offer it in evidence because I feel it would not be of very much value.

I feel that is all I have so far as my opening statement is concerned.

The Court: You may proceed.

Mr. Belcher: I might say, if your Honor please, that the position of the Department is that this action is somewhat premature [8] in view of the fact that one of the essential allegations in the Complaint is that they have been denied the right or privilege of an American citizen.

The status of the nationality of the applicant has not yet been determined by the Consul.

The only evidence that the plaintiff in this case can present is hearsay.

Mr. Merges and I have been in conference since about nine (9:00) o'clock. Yesterday when we discussed the matter he thought he had one witness who was present in China at the time the child was born, but it later develops it was two (2) years later that the grandmother was in China.

So that I believe the evidence here will all be hearsay. I suggested to counsel this morning that I thought perhaps a delay in the hearing—rather than taking a chance on having the rights of this party determined adversely to him, that it might be better to wait until the State Department, or the Consul in China, had acted.

I concede, if your Honor please, that the father is an American citizen; alleged father, that is.

I haven't any objection to delivering to counsel,

if he desires to offer it in evidence, a copy of a letter that is addressed to me as Assistant United States Attorney, from the Director of Immigration, conceding that the alleged father is an American citizen and he was in China at such time as to have been possible for him to have been the father of this Plaintiff. [9]

We did not file an Answer and I take it the Court will permit me to treat it as a general denial.

Motion to dismiss, which was filed earlier in the proceedings——

The Court: That was denied, was it not? The motion to dismiss was denied?

Mr. Belcher: I take it that it was, but no formal order was entered.

The Court: No order entered?

Mr. Merges: Yes, there was an order entered.

Mr. Belcher: Well, that was an oversight on my part then that I didn't get an Answer in.

Mr. Merges: There was an order entered on the 10th of July, 1952.

Mr. Belcher: But, if we can treat this as a general denial, we can take the evidence if Counsel so desires.

The Court: July when?

Mr. Merges: July 14th, if your Honor please.

The Clerk: Plaintiff's Exhibit Number 1 marked for identification.

(Plaintiff's Exhibit Number 1 marked for identification.)

The Court: Do you have a copy of it, Mr. Merges?

Mr. Merges: Yes, if your Honor please.

The Clerk: Plaintiff's Exhibit Number 2 marked for [10] identification.

(Plaintiff's Exhibit Number 2 marked for identification.)

Mr. Belcher: That was the order denying our motion to stay.

The Court: Well, the record may show that there was no motion to dismiss filed.

Mr. Belcher: No; it was returned with the order to show cause.

The Court: And that the motion to stay has been denied, and the Defendant having failed to file an Answer, and the Plaintiff having to put on proof anyway, the Court will consider the allegations denied, and you may proceed.

Mr. Merges: I will offer, if your Honor please, Plaintiff's Exhibit 1, being a photostatic copy of the father's certificate of identity, the original certificate having been compared with the photostatic copy by Mr. Belcher this morning, and I think Mr. Belcher will stipulate that that is a true copy of the certificate of identity issued by the Immigration Service.

Mr. Belcher: It is so stipulated.

The Court: The stipulation may be admitted, and Plaintiff's Exhibit 1 may be admitted.

There is no objection?

Mr. Belcher: No objection.

(Plaintiff's Exhibit Number 1 [11] admitted in evidence.)

Mr. Merges: I will offer Plaintiff's Exhibit 2, being a copy of a letter signed by John Boyd, being a brief statement of the Immigration Service relative to the contents of the father's file in this case.

Mr. Belcher: No objection, your Honor.

The Court: It may be admitted.

(Plaintiff's Exhibit Number 2 admitted in evidence.)

Mr. Merges: Lee Kut, will you step forward, please? [12]

LEE KUT

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Merges:

Q. Will you state your name to the Court, please? A. My name is Lee Kut.

Q. You must speak louder now. Mr. Belcher and I can't hear you. A. My name is Lee Kut.

Q. Showing you what the Clerk has marked Exhibit 1, is that a copy of your Certificate of Identity? A. It is.

Q. That indicates that you landed in this country as an American citizen on the 14th of October, 1913; is that correct? A. That is correct.

(Testimony of Lee Kut.)

Q. How long did you live in this country after your admission in 1913? A. Until 1921.

Q. Did you come to this country with your mother? A. Yes, sir.

Q. And your father? A. Yes, sir.

Q. Your father is dead? [13] A. Yes, sir.

Q. Your mother is present in court this morning? A. Yes, sir.

Q. Did you return to China in 1921?

A. Yes, sir.

Q. Were you married? A. No, sir.

Q. When did you marry?

A. The year of 1925.

Q. In China? A. Yes, sir.

Q. Who did you marry? A. Lew She.

The Court: How do you spell that?

Mr. Merges: L-e-w S-h-e (spelling).

Q. (By Mr. Merges): That was a woman of the Lew family, I take it. A. That is right.

Q. And by reason of her marriage, according to the Chinese custom, she added the character "She" to her name indicating she was a married woman of the Lew family? A. That is correct.

Q. How many children did you have?

Mr. Merges: Strike that please, Mr. [14] Reporter.

Q. (By Mr. Merges): Did you marry Lew She in accordance with the Chinese custom?

A. Yes.

Q. Did you consummate a valid marriage with Lew She? A. Can you explain that, sir?

(Testimony of Lee Kut.)

Q. Was your marriage valid according to Chinese law? A. Yes.

Q. And you thereafter lived with her as her husband; is that correct? A. That is correct.

Q. What children do you have?

A. I have three (3) children.

Q. Will you name them? Did you have them all by Lew She? A. Yes, sir.

Q. When was the boy, who is the subject of this action, Lee Gnan Lung, born?

A. He was born in 1926.

Q. Had you been in China just prior to that time? A. Yes, sir.

Q. When did you make that trip to China?

A. I made that trip to China in 1925.

Q. And you were still married to Lew She at that time? A. Yes, sir. [15]

Q. And your boy, Lee Gnan Lung, was born as a result of that union on that trip; is that correct?

A. That is correct.

Q. Showing you what the Clerk has marked Plaintiff's Exhibit 3, purporting to be a picture of a young Chinese, can you identify that picture?

(Plaintiff's Exhibit Number 3 marked for identification.)

A. Yes, sir.

Q. Who is it? A. That is my son.

Q. Lee Gnan Lung? A. Correct, sir.

Q. Is that an accurate likeness of him?

A. That is a very accurate likeness.

(Testimony of Lee Kut.)

Q. Now, after this boy was born in 1926, when did you next return to China?

A. I next returned to China in 1934.

Q. You returned to China in 1934. Did you see that boy for the first time then?

A. Yes, sir; that was the first time.

Q. How long did you remain in China on that trip? A. Oh, not more than a year.

Q. Is there any doubt in your mind but that the boy Lee Gnan Lung was the son who was born to you? [16] A. Yes; that is my son.

Q. That is your son. I said, is there any doubt in your mind? A. There is no doubt.

Q. How long did you remain in China on that trip? A. On that trip?

Q. That is the 1934 trip, the first time you saw this boy?

A. The first time I saw him, I remained in China until 1935. I returned to this country in 1935.

Q. And did you make another trip to China?

A. After 1935?

Q. Yes. A. Yes, sir.

Q. What was your second trip to China?

A. My second trip to China was 1926.

Q. Then that would be—I mean the trip after 1935?

A. After 1935? That trip was made in 1939.

Q. And how long did you remain in China then?

A. Oh, not more than a year.

Q. Did you go to your home village and your home in China? A. Yes, sir; I did.

(Testimony of Lee Kut.)

Q. Was your son Lee Gnan Lung living in your home?

A. There was two (2) sons living in my home.

Q. Was one of them Lee Gnan Lung? [17]

A. Lee Gnan Lung, the eldest.

Q. And did you see him at that time?

A. Yes, sir.

Q. Did you live in your home during the time you were in China on that trip? A. Yes, sir.

Q. When did you return from China to the United States? A. 1940.

Q. 1940? A. Yes, sir.

Q. Have you been to China since then?

A. No, sir.

Q. Have you served in the Armed Services?

A. I have, sir.

Q. And were you honorably discharged?

A. Yes, sir.

Q. Were you ever convicted of a narcotics violation? A. I was, sir.

Q. And did you serve your time for that?

A. Yes, sir.

Q. How long?

A. A little over two (2) years, sir.

Q. And have you ever been in any other kind of trouble other than that? A. No, sir. [18]

Q. Were you honorably discharged from the Service? A. Yes, sir.

Q. How long did you serve?

A. Oh, about a little over three (3) years.

(Testimony of Lee Kut.)

Q. A little over three (3) years? A. Yes.

Q. Did you serve overseas? A. Yes, sir.

Q. And what were you in over there?

A. Actually?

Q. Yes.

A. My branch of service was the infantry.

Q. And did you receive any awards?

A. Yes, sir.

Q. Will you state what they were?

A. It is written in my discharge.

Q. Well, what were they?

A. May I look at it?

Q. Yes.

Mr. Belcher: I think that is immaterial, your Honor.

The Court: Oh, the Court will overlook the objection and permit it.

A. Oh, I have the Bronze Star and Good Conduct Medal and Asiatic Service Medal. [19]

Q. (By Mr. Merges): May I see your Certificate of Discharge, please? A. Yes, sir.

Q. When did you make your next trip to China, or did you make any other trips to China?

A. None.

Q. Pardon? A. None.

Q. No other trips to China.

Did you file an affidavit with the American Consul to bring your son over here? A. I did.

Q. Lee Gnan Lung? A. I did.

Q. And that was filed in March of 1951? Is that correct? A. That is correct.

(Testimony of Lee Kut.)

Q. And no action has been taken on that yet; is that true? That is at least he is not here yet?

A. My son is not here yet.

Q. Now, there have been certain other members of your family who have been back to China.

Did your mother make a trip back to China shortly after your son, Lee Gnan Lung, was born?

A. I believe my mother made a trip to China when my son was at the age of two (2). [20]

Q. And how long did she remain there, if you know?

A. Oh, not more than a year that I know of.

Q. Did your brother make a trip back to China?

A. He did, sir.

Q. And was that when your son was—after your son was born?

A. He made a trip to China after my son was born.

Q. For the purpose of getting married?

A. My brother was getting married.

Q. Yes. A. Yes, sir.

Q. Your brother now lives in Seattle with you; is that correct? A. That is correct, sir.

Q. And you and your brother operate what kind of a business?

A. Oh, we operate a wholesale steam laundry.

Q. What is the address of it?

A. 160 Twelfth Avenue.

Q. How long have you operated that laundry?

A. Oh, a little more than two (2) years.

Q. How many employees do you have?

(Testimony of Lee Kut.)

A. We have a staff of twelve (12).

Q. You do laundry in wholesale quantities for hotels and institutions; is that correct? [21]

A. And Chinese hand laundries.

Q. And Chinese hand laundries send their laundries in to you and you do it in large quantities?

A. That is correct.

Q. Where is your father?

A. My father is dead.

Q. Your mother is here in Seattle?

A. That is correct.

Q. And where is Lew She? A. She died.

Q. When did she die? A. In the year 1942.

Q. Who is living in your home? What is the condition—I mean in your home village—what is the condition there, or do you know?

A. The last I know of they were home with their cousins.

Q. Is that in communist territory?

A. That is now held—that is now in communist territory.

The Court: You are referring to whom now?

Mr. Merges: His home. His house. His family house, your Honor.

Q. (By Mr. Merges): Now your son, Lee Gnan Lung, was successful in getting out of communist territory and getting into the city of Hong Kong; is that correct? [22] A. That is correct.

Q. And he has been living there awaiting passage to this country; is that correct?

(Testimony of Lee Kut.)

A. That is correct.

Q. And how long has he been in Hong Kong?

A. Oh, he has been in Hong Kong for over two (2) years.

Q. What is he doing there?

A. Well, he is some sort of an assistant clerk in a Chinese hotel.

Q. Just waiting to come to this country?

A. Just waiting to come to this country.

Q. Now, when you made your allotments in the Service did you mention this son, Lee Gnan Lung?

A. I did, sir.

Q. And did you send a copy, or the original, of the document indicating this allowance and mention of this son, Lee Gnan Lung, back to the American Consul in Hong Kong as evidence in this case for him to consider? A. I did, sir.

Q. And you haven't seen it since?

A. No, sir.

Q. Is that correct? A. Yes, sir.

The Clerk: Plaintiff's Exhibit Number 4 marked for identification. [23]

(Plaintiff's Exhibit Number 4 marked for identification.)

Mr. Merges: I will offer 3, the picture.

Mr. Belcher: No objection.

The Court: It may be admitted.

(Plaintiff's Exhibit Number 3 admitted in evidence.)

(Testimony of Lee Kut.)

The Clerk: Plaintiff's Exhibit Number 5 marked for identification.

(Plaintiff's Exhibit Number 5 marked for identification.)

Mr. Belcher: What is 4?

Mr. Merges: 4 is that picture.

Q. (By Mr. Merges): Showing you what has been marked Plaintiff's Exhibit 4, purporting to be a photograph containing the likeness of three (3) individuals, reading from right to left, will you tell us who the man in the white suit is?

A. That man in the white suit works in the hotel where we were staying at.

Q. Who is the small boy sitting on the pedestal in the middle?

A. That is my nephew who is at present in the court room.

Q. He is a witness present in court to testify today? [24] A. Yes, sir.

Q. And who is the one on the extreme right?

A. The one on the extreme right is my son.

Q. Your son Lee Gnan Lung?

A. My son Lee Gnan Lung.

Q. About how long ago was this picture taken?

A. The picture was taken in 1940, or something; 1940.

Q. Now, you had——

Mr. Merges: I will offer this in evidence.

Mr. Belcher: I would like to ask:

(Testimony of Lee Kut.)

Were you present at the time this photograph was taken?

The Witness: No, sir.

Mr. Belcher: Objected to, if your Honor please, as hearsay.

Mr. Merges: Well, I will wait until I have one of the individuals who was present, so that I will offer it later when he gets on the stand.

I will offer Plaintiff's Exhibit 5, being the father's service record.

Mr. Belcher: No objection, your Honor.

The Court: It may be admitted.

(Plaintiff's Exhibit Number 5 admitted in evidence.) [25]

Q. (By Mr. Merges): Is there any doubt in your mind at all but that this boy, Lee Gnan Lung, is your son? A. He is my son.

Q. Why do you wish him to come to the United States?

A. To help me in the business and also to have him with me.

Q. Are there any other witnesses, so far as you know, other than the ones we have this morning in court, that know anything about this case?

A. There is, but they are unobtainable.

Mr. Merges: You may inquire.

(Testimony of Lee Kut.)

Cross-Examination

By Mr. Belcher:

Q. You say you are anxious to have this boy with you? A. Yes, sir.

Q. How long have you been anxious to have him with you?

A. Well, since China was occupied by the communists.

Q. Well, he is—How old is he now?

A. He is twenty-seven (27) this year.

Q. Twenty-seven (27). When did he finish school, do you know, in China? A. In China?

Q. Yes.

A. Well, according to what kind of a school. There is [26] various schools. He has been, right now he is, in Hong Kong studying English.

Q. But when did he finish ordinary school.

A. Oh, ordinary school, in China that would require about six (6) to nine (9) years. That would be when he was around fifteen (15).

Q. You made no effort to get him here after he han completed school, did you?

A. No. I made no effort because his grandfather was born then; his grandfather was still alive then.

Q. And how long has his grandfather been dead?

A. His grandfather died in 1941.

Q. His grandfather died in 1941?

A. Yes, sir.

Q. That is eleven (11) years ago?

A. Yes, sir.

(Testimony of Lee Kut.)

Q. Did you make any effort to bring him to this country within the last eleven (11) years until just recently?

A. I have, but I was unable to. I spent a few years in the Service, was incarcerated for two (2) years, or more, and at other times I was financially unable to.

Q. You were not present in China at the time this boy was born? A. No, sir.

Q. So what you know about his birth somebody told you? [27]

A. No. Oh, the birth, someone told me, yes.

Q. Yes, and what is your means of identification of him?

A. Of my means of identification of him is when I made that trip in 1934. His means of identity, why, I wouldn't say he exactly looks like me, but there are a few resemblances that he looks like me.

Q. There is quite a resemblance among Chinese people generally, isn't there?

A. Yes, but between father and son there is a little distinction.

Q. Now, what time in 1925—what date—did you go to China?

A. We left here in the fall. I presume that would be in around September or October.

Q. September or October? A. Yes.

The Court: 1925?

The Witness: Yes, sir.

Q. (By Mr. Belcher): How long did it take you to get to China from here?

(Testimony of Lee Kut.)

A. Let's see. In those days a steamship averaged twenty-one (21) to twenty-two (22) days.

Q. And do you remember whether it was September or October that you arrived in China, or November?

A. I would say I did arrive in Hong Kong in about October. [28]

Q. The later part, or early part?

A. I would say the early part.

Q. The early part; and when did you leave China? A. In 1926.

Q. 19—What month in 1926?

A. I don't remember that date, sir.

Q. Do you remember the month?

A. Of my arrival?

Q. The month that you left the village?

How far is it from the village to the port where you left China?

A. What was that, sir? How far was the village?

Q. How far is it from the village in which you lived to the port from which you sailed for the United States?

A. Oh, on an authorized map of the world I would say that would be around 140 miles.

Q. And how long would it take you to make that trip? A. Less than a day.

Q. How many? A. Less than a day.

Q. By railroad? A. Railroad and boat.

Q. But you can't remember the month that you left there in 1926? A. No, sir. [29]

(Testimony of Lee Kut.)

Q. Who told you that you had a son born?

A. Well, my wife sent a letter.

Q. Have you got that letter?

A. Not since 1926, sir.

Q. So that your only knowledge of the birth of this alleged child is what someone else told you?

A. That someone else is my wife.

Mr. Belcher: That is all.

Mr. Merges: That is all. Step down.

The Court: I want to ask one question.

What period of time were you imprisoned on the narcotics charge?

The Witness: From 1947 until 1948.

The Court: Was that in this District; in this area?

The Witness: No, sir.

Mr. Belcher: Pardon me just a moment. One question.

Q. (By Mr. Belcher): Do you remember the date that you married your wife?

A. Yes. That was in November, sir.

Q. November what year? A. 1925.

Q. About one (1) month after you arrived there?

A. Yes, sir. [30]

Mr. Belcher: That is all.

(Witness excused.)

Mr. Merges: Let me say, if your Honor please, with reference to the narcotics violation, I don't know that the Government had any knowledge of that in this case but I wanted to be sure, and this man asked me particularly to disclose it to the

Court so that the Court would know all the good things about him and the bad things both. He wished to be absolutely frank and disclose it to the Court of his own violition.

Will you come forward please, Grandmother?

I think we will need an interpreter on this one.

Do you speak English?

The Witness: Not much.

Mr. Merges: Let's try. [31]

LAM GNAN

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Plaintiff's Exhibit 6 marked for identification.

(Plaintiff's Exhibit Number 6 marked for identification.)

Direct Examination

By Mr. Merges:

Q. Showing you what the Clerk has marked Plaintiff's Exhibit 6, is that a copy of your Certificate of Identity? A. Yes.

The Court: Would you identify the witness.

Mr. Merges: I beg your pardon.

Q. (By Mr. Merges): Will you state your name to the Court, please?

A. I can't speak much that.

Q. Just state your name. A. My name?

(Testimony of Lam Gnan.)

Q. Just state your name. A. Lam Gnan.

Q. You are the grandmother of Lee Gnan Lung?

A. Yes.

Q. Is that right? [32] A. Yes.

Mr. Merges: I will offer Plaintiff's Exhibit 6 for identification.

Mr. Belcher: What of?

Mr. Merges: It is a photostat of this lady's Certificate of Identity showing her immigration status.

Will you swear this man as interpreter, please?

(Whereupon Chock Lim Lee was sworn as an interpreter.)

Mr. Merges: I will ask the questions and you translate them into Chinese for the witness and give us her replies in English.

The Interpreter: All right.

Q. (By Mr. Merges): You came to this country in 1913, is that correct? A. That is correct.

Mr. Merges: Speak so that people can hear you now. If you are going to be in interpreter, speak so that we can hear you.

Q. (By Mr. Merges): When did you go back to China?

A. She says she went back after eight (8) years in the United States.

Q. After eight (8) years. That would be approximately 1920. [33] A. 1921.

Q. How long did you stay in China on that trip?

A. About five (5) or six (6) months.

(Testimony of Lam Gnan.)

Q. You then returned to the United States?

A. Yes, sir.

Q. When did you go to China again?

A. I forget exactly what year it was.

Q. Was it in 1928?

A. She thinks it might be.

Q. 1928? A. Yes.

Q. Now, do you have a son named Lee Kut?

A. Yes, she has.

Q. Was that the man who just testified?

A. That is correct.

Q. When you went back to China in 1928, did you go to Lee Kut's house? A. She did.

Q. Did you see that he had a wife?

A. Yes, she did.

Mr. Belcher: Just a moment.

The Court: Do you have an objection?

Mr. Belcher: Yes, your Honor. "Did" she "see that he had a wife?" I don't know what Counsel means by the question. [34]

Q. (By Mr. Merges): Did he have a wife living in the house?

Mr. Merges: Is that all right?

Mr. Belcher: Well, if she knows.

Q. (By Mr. Merges, continuing): If you know?

A. She knows. She has.

Q. Did you go and live in that house with the wife?

A. She lived on one side and Mr. Lee Kut lived on the other.

Q. One side of the same house?

(Testimony of Lam Gnan.)

A. There is a long hallway in between; more or less of a small street in between. I lived across the street but the streets are about six (6) feet long.

Q. Six (6) feet across?

A. Yes, six (6) feet across.

Q. Did Lee Kut's wife have any children in 1928 when you were there? A. Yes, he has.

Q. Did he have a son named Lee Gnan Lung?

Mr. Belcher: Just a moment. I object to the form of the question.

I think that is leading and suggestive. I think she can answer the question as to whether he had a son, and then name the son. [35]

The Court: If the objection is made, you might rephrase the question.

Q. (By Mr. Merges, continuing): What was the son's name? A. Lee Gnan Lung.

Q. And how old was he at that time, approximately? A. About two (2) years old.

Q. How long did you remain in China on that trip? A. She said just for several months.

Q. When did you go—Did you then return to the United States? A. That is correct.

Q. When did you go back to China again?

A. She said just a few years after her return.

Q. Just a few years after your return?

A. That is right.

Q. How long did you stay on that trip?

A. Just several months.

Q. Did you see any children of Lee Kut on that trip? A. She has forgot.

(Testimony of Lam Gnan.)

The Interpreter: May I make a statement?

Mr. Merges: No. You are not sworn as a witness.

Q. (By Mr. Merges): Is that the last trip you made to China? A. (No answer.) [36]

Mr. Merges: Can the witness answer the question, or not?

The Interpreter: She can't. She is kind of nervous.

The Court: The Court will take a ten (10) minute recess.

(Whereupon, at 11:00 o'clock a.m., a recess was had until 11:13 o'clock a.m., October 22, 1952, at which time, counsel heretofore noted being present, the following proceedings were had to wit):

Mr. Merges: Ask the Witness:

Q. Were you in China in 1928?

A. She was.

Q. And did you see Lee Kut's son, Lee Gnan Lung, at that time? A. She did.

Q. Did you make another trip to China?

A. She did.

Q. And when was that? A. 1931.

Q. How long did you stay on that trip?

A. About eight (8) or nine (9) months.

Q. Did you see Lee Gnan Lung at that time?

A. She did. [37]

Q. Did you make another trip to China?

A. She did.

Q. And when was that? A. About 1934.

(Testimony of Lam Gnan.)

Q. And did you see Lee Gnan Lung at that time? A. She did.

Q. Did you make another trip to China?

A. Yes, she did.

Q. When was that? A. 1939.

Q. And did you see Lee Gnan Lung at that time?

A. She did.

Q. Showing you what the Clerk has marked Plaintiff's Exhibit 3, can you identify that picture?

A. That is Lee Gnan Lung.

Q. Is there any doubt in your mind but what this picture represents your grandson?

A. No doubt whatsoever.

Mr. Merges: You may inquire.

Cross-Examination

By Mr. Belcher:

Q. You say there is no doubt in your mind that the picture that was just shown you is your grandson.

How do you know he is your grandson?

A. Because she has seen him several times. [38]

Q. Who told you? Did somebody tell you that he was your grandson?

A. She says she recognizes him.

Q. How could you? How do you recognize him?

A. She has seen him several times in the past when he was a baby she saw him then on several trips she saw him.

Q. Where did you see him?

(Testimony of Lam Gnan.)

A. At his house.

Q. Were you there when he was born?

A. She was not.

Q. Do you know when he was born?

A. She does.

Q. When was it?

A. September. 15th of September.

Q. What year? A. 1926.

Q. How do you know that?

A. Mrs. Lee Kut sent her a letter and told her about it.

Q. Have you got that letter?

A. No, she hasn't. She said she read the letter and kept it a while and then it disappeared among the belongings.

Q. Did you ever see a birth certificate?

A. There is no birth certificate issued in China, she says.

Q. So that your entire testimony as to the identity of this boy is based on what somebody told you; is that correct? [39]

A. She knows it because of the fact that her own daughter-in-law wrote and told her about it.

Q. That is the entire source of her information?

A. That is correct.

Q. Do you know whether or not in China it is a custom for the Chinese people to take other children into their homes?

A. Yes, she does. She knows.

Q. And is that the custom? A. Yes.

(Testimony of Lam Gnan.)

Q. That is the custom; and when the other children are brought in to the home they are considered sons or daughters; are they not? A. Yes.

Q. How do you know this child was—of your own knowledge how do you know that this child was not brought in to the home where you visited?

A. She says all she knows is that the son was born and not adopted.

Q. How do you know that?

A. Well, she says that according to Mrs.—her daughter-in-law wrote and told her about it at the time of his birth.

Q. And that is the entire extent of her knowledge? A. That is correct.

Q. Where abouts in China were you born?

A. Tai Low Hou. [40]

Q. Where is that with reference to the place where your daughter-in-law lived?

A. She says over one (1) mile.

Q. Over one (1) mile? A. Yes.

Q. And when you visited in 1928, did you have any other members of your family living in that village?

Mr. Merges: Which village?

Mr. Belcher: Where she lived herself.

The Interpreter: Prior to her marriage?

The Court: Are you speaking now of relatives of the witness?

Mr. Belcher: Yes.

Mr. Merges: I object to that as immaterial and confusing.

(Testimony of Lam Gnan.)

Mr. Belcher: This is cross-examination, your Honor.

The Court: I think the question, properly or clearly stated, may be answered. I didn't get what you were getting at. You may restate it.

Mr. Belcher: Would you read it?

(Whereupon, material appearing on lines 6 and 7, page 41, read by the Reporter.)

Q. (By Mr. Belcher) (Continuing): The village where you said you lived [41] prior to 1928.

The Court: She, of course, has been in this country since 1921.

Q. (By Mr. Belcher) (Continuing): Prior to coming to this country.

The Court: Mr. Interpreter, do you understand the question?

The Interpreter: Not too clearly.

Mr. Belcher: I will rephrase it.

The Interpreter: Rephrase it, please.

Q. (By Mr. Belcher) (Continuing): What was the name of the village in which you lived prior to coming to the United States?

The Interpreter: Prior to her first trip to the United States?

Mr. Belcher: Yes.

A. She lived at Wah Lim Lee.

Q. (By Mr. Belcher): And how far is that from the village where your sister-in-law lived in 1928?

The Interpreter: Sister-in-law?

(Testimony of Lam Gnan.)

Mr. Merges: I object to that. We are not talking about a sister-in-law.

Q. (By Mr. Belcher) (Continuing): Daughter-in-law? [42] A. About one-half (½) mile, sir.

Q. Now, when you visited in 1928, were there any of the immediate members of your own family living in the village that you had lived in prior to your return to China in 1928?

A. She has her husband there at the time.

Q. And did you live with your husband?

A. Yes, she does.

Q. So that you were one-half (½) a mile away from where your daughter-in-law lived.

Mr. Merges: No.

The Interpreter: No. You got things mixed up.

Mr. Merges: She testified she lived across the alley.

Mr. Belcher: I understand.

The Interpreter: The witness wants to know if you meant by that statement is the former—that is Mr. Lee Kut's wife, before—prior—to her marriage to Mr. Lee Kut or after her marriage to Mr. Lee Kut——

Mr. Belcher: I understand that after she visited China in 1928, she says, and at that time, she had a husband living.

The Interpreter: That is right.

Mr. Belcher: Where did that husband live?

The Interpreter: They lived together, her husband and the witness. [43]

(Testimony of Lam Gnan.)

Q. (By Mr. Belcher): In this village that she lived in prior to her coming to the United States the first time; is that right?

A. That is correct.

Q. On your direct examination you said that when you visited China in 1928 you lived across from the house occupied by your daughter-in-law. Which is correct?

A. The witness states this:

That when the question was asked how far Mr. Lee Kut's wife lived from where she lived, she thought you meant before her marriage to Mr. Lee Kut. That is one-half (½) mile distance. But after the marriage of Mr. Lee Kut, the witness and Mrs. Lee Kut lived only across the alley from one another.

Q. When did your husband die? A. 1941.

Q. In China? A. Yes.

Mr. Belcher: I think that is all.

Mr. Merges: That is all.

(Witness excused.)

Mr. Merges: Lee Yick. [44]

LEE YICK

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Merges:

Q. Will you state your name, please?

A. Lee Yick.

Q. Are you the brother of Lee Kut who testified as the first witness in this case?

A. Yes.

Q. Speak so that we can hear you, please?

A. Yes, sir.

Q. And do you operate the Star Laundry with him? A. Yes, sir.

Q. When were you admitted to this country?

A. In 1921.

Q. You are an American citizen?

A. Yes, sir.

Q. And you have lived in this country since that time with the exception of some trips to China; is that correct? A. Yes.

Q. Did you make a trip to China in 1928?

A. Yes, sir.

Q. When you went to China, did you go to your brother, [45] Lee Kut's house? A. Yes, sir.

Q. What was the purpose of your going there?

A. At that time my father and my mother and

(Testimony of Lee Yick.)

I went back to China and we visited my brother's wife and my brother's wife told me that Lee Gnan Lung is my brother's son.

Q. Where did you live? Did you live next door to Lee Kut's house when you were in China on that trip? A. With my mother.

Q. Is your mother and father's house next door to Lee Kut's house? A. Yes.

Q. How far away? A. About five (5) feet.

Q. And then you went back to China in 1928 for the purpose of getting married?

A. Yes, sir.

Q. In company with your father and mother?

A. Yes, sir.

Q. How long did you remain in China on that trip? A. About nine (9) months.

Q. And during that time did you live in that house about five (5) or six (6) feet away from Lee Kut's house?

A. After I came there I lived in about five (5) houses from my mother and my brother's [46] house.

Q. About five (5) houses? A. Yes.

Q. In the same row?

A. In the same village.

Q. Same village? A. Yes.

Q. Now, did you go over to Lee Kut's house very often? A. We eat together.

Q. You ate together?

A. At my mother's house.

(Testimony of Lee Yick.)

Q. And did you see Lee Kut's son, Lee Gnan Lung, when you were over there at your brother Lee Kut's house? A. Yes, sir.

Q. Is there any—Was he an adopted boy or a real son? A. That is a real son.

Q. Would you have known if he was adopted? Would you have known it if he was an adopted boy?

A. Known? What do you mean "known"?

Q. Would you have known it? Would you know whether he was a blood son or an adopted boy?

A. Yes, he is.

Q. Would you have known if this boy was adopted?

The Interpreter: May I interpret that?

Mr. Merges: No, he can understand. [47]

Q. (By Mr. Merges): Would you have known whether or not Lee Gnan Lung was adopted?

Do you know what an adopted boy is?

A. Yes.

Q. Do you know what an adopted boy is?

A. Yes, but I don't get the idea "known."

Q. Well, was Lee Gnan Lung adopted?

A. No.

Q. How do you know he wasn't?

A. His wife told me. My brother's wife.

Mr. Belcher: That is objected to.

Q. (By Mr. Merges): When did you go to China again? A. In 1931.

Q. In 1931? A. Yes, 1930 or 1931.

(Testimony of Lee Yick.)

Q. Now wait a minute, you went there in 1928 to get married? A. Yes.

Q. And when did you make another trip back?

A. Around 1931.

Q. Did you see Lee Gnan Lung on that trip?

A. Yes, sir.

Q. Was he living in Lee Kut's house? [48]

A. Yes.

Q. How long did you stay on that trip?

A. Oh, about nine (9) months.

Q. When did you make another trip to China?

A. 1934.

Q. Did you see Lee Gnan Lung then?

A. Yes.

Q. How long did you stay on that trip?

A. About nine (9) months.

Q. Was Lee Gnan Lung living in your brother Lee Kut's house at that time? A. Yes, sir.

Q. When did you go to China again?

A. 1939.

Q. How long did you stay on that trip?

A. Oh, about nine (9) months.

Q. Did you see this boy on that trip?

A. Yes, sir.

Q. Was he living in your brother Lee Kut's house? A. Yes, sir.

Q. Showing you what has been marked Plaintiff's Exhibit 3, can you identify that individual?

A. That is Lee Gnan Lung.

Q. Is he your nephew? A. Yes, sir. [49]

Q. Was that your mother who just testified?

(Testimony of Lee Yick.)

A. Yes, sir.

Q. Where is your father?

A. My father is dead.

Q. Does your mother live with you now?

A. Yes, sir.

Q. And you are married and have a wife and children here in Seattle? A. Yes, sir.

Mr. Merges: You may inquire.

Cross-Examination

By Mr. Belcher:

Q. You were not in China at the time—you were not in China on February 15, 1926, were you?

A. No, sir.

Q. Did you ever see any birth certificate?

A. No, sir.

Q. (Continuing): Showing the birth of Lee Gnan Lung? A. No, sir.

Q. So that the only knowledge you have as to when he was born is this statement made to you by somebody else; is that correct?

A. What statement?

Q. Somebody told you that he was?

A. Yes, my brother's wife told me. [50]

Q. Your brother's wife told you? A. Yes.

Q. And that is the only information you have on the subject? A. Yes.

Q. Did you ever try to verify that in any way by checking a birth certificate?

Mr. Merges: He probably doesn't know what "verify" means.

(Testimony of Lee Yick.)

Q. (By Mr. Belcher): Do you know what birth certificates are? A. Yes; I have got one.

Q. They are issued in China, aren't they?

A. No.

Q. You say no birth certificates are issued in China?

A. When they live in the village they don't have it.

Q. Is there any record at all of births?

A. No.

Q. The only information you have as to whether or not this boy is your nephew is what somebody else told you; is that correct?

A. That is my brother's wife told me.

Q. Yes; and that is the entire source of your knowledge, isn't it? A. Yes. [51]

Q. Have you any children of your own?

A. Yes, sir.

Q. Were they born in this country or in China?

A. Some in China and some here.

Q. And don't you know as a matter of fact that the village head master—what do they call it—head of the village——

Mr. Merges: Head man; not head master.

Q. (By Mr. Belcher) (Continuing): ——head man of the village—is that what you call him?

A. Head man of the village.

Q. Is that what they call him? Was there a head man of your village where you lived?

A. Just old people. They ain't got any head man in the village.

(Testimony of Lee Yick.)

Q. They don't have any head man in the village?

A. No.

Q. Did you report to whoever was in charge of the village the birth of your children in China?

A. No.

Q. Do you know of any record of any kind that is kept in China of the birth of your children?

A. No. My wife told me.

Q. You were in the United States at the time your first child was born? [52] A. Yes.

Q. So you only know that the child was born by what your wife told you? A. Yes.

Q. And you only know about the Plaintiff in this case, Lee Gnan Lung, by something that somebody else told you? A. Yes.

Mr. Belcher: Yes. That is all.

Redirect Examination

By Mr. Merges:

Q. Showing you what has been marked as Plaintiff's Exhibit 4, is this your little boy sitting up here on the pedestal in this group picture?

A. Yes, sir.

Q. And who is this man over here at the extreme right? A. My nephew Lee Ging Lung.

Q. That is the applicant in this case. By Lee Ging Lung you mean Lee Gnan Lung, do you not?

A. Yes, sir.

Q. That is the same person? A. Yes.

Mr. Merges: That is all.

(Witness excused.) [53]

LEE NGAN

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Merges:

Q. State your name, please?

A. Lee Ngan.

Q. How long have you lived here, Mr. Ngan?

A. Since I was brought over here. That was in 1940.

Q. You landed here in 1940? A. Yes, sir.

Q. You are the son of Lee Yick who just testified? A. Yes, sir.

Q. Prior to the time you landed here in 1940, where did you live? A. In China, sir.

Q. Did you live in your father's house in China?

A. Yes.

Q. Was that located in the same village where your uncle Lee Kut and your grandfather and grandmother lived? A. Yes, sir.

Q. How far was your uncle, Lee Kut's house from your grandfather's house?

A. My father's house was the first house. [54]

Q. I didn't ask you that. How far was your uncle, Lee Kut's, house from your grandfather's house, or your grandmother's house?

A. My uncle's house from my grandmother's house? They were right next together.

(Testimony of Lee Ngan.)

Q. Now, your uncle, Lee Kut, did he have any children? A. Yes, sir.

Q. Did he have a son named Lee Gnan Lung?

A. Yes, sir.

Q. Did you live in the same village with that son from the time you were born?

A. Yes, sir.

Q. I show you a picture marked Plaintiff's Exhibit 4. In the middle of that picture is a small boy sitting on a pedestal. Who is it?

A. That is myself.

Q. Will you speak so that people can hear you?

A. That is myself.

Q. How old were you there?

A. Oh, six (6), I believe.

Q. About six (6)? A. Yes.

Q. How old are you now?

A. Now, I am eighteen (18).

Q. Do you have any recollection of when that picture was [55] taken? A. Yes.

Q. Inviting your attention to the man, or the boy on your left, or on the right looking at the picture, who is that?

A. That is Lee Gnan Lung, my cousin.

Q. Will you speak so that people can hear you?

A. That is Lee Gnan Lung, my cousin.

Q. And he is the son of your uncle, Lee Kut?

A. Yes.

Q. Now, is he an adopted boy? A. No.

Q. Is there any doubt but what this boy is your

(Testimony of Lee Ngan.)

cousin and the son of Lee Kut? Is there any doubt in your mind of that? A. None whatsoever.

Q. What are you doing now?

A. I am attending high school at Garfield.

Mr. Merges: You may inquire.

Cross-Examination

By Mr. Belcher:

Q. When did you say this picture——

Mr. Belcher: Exhibit 4, is it?

Mr. Merges: Yes, Exhibit 4.

Q. (By Mr. Belcher) (Continuing): ——when was that taken?

A. That was taken just before I came to [56] America.

Q. Well, how long before you came to America?

A. I landed here or arrived here in 1940.

Q. And this picture, Exhibit Number 4, was taken how long, how many weeks, or months, before you came?

A. Well, sir, stating in weeks and months I would not know because I was only six (6) then. I would imagine closely—not a very long time—before I came.

Q. Who took the picture?

A. A professional photographer.

Q. You don't know his name?

A. No, sir.

Q. Now the one in the center is you?

A. Yes, sir.

(Testimony of Lee Ngan.)

Q. And now when were you born?

A. February 23, 1935.

Q. So that you weren't born at the time Lee Gnan Lung was born, were you? He is older than you? A. Yes.

Q. And who told you that he was your—related to you in any way?

A. My grandmother, my uncle, my father and my mother and the villagers.

Q. And that is the extent of your knowledge?

A. Also my grandfather.

Q. Now, in 1940, you were approximately six (6) years [57] old? A. Yes, sir.

Q. When was it that you say your grandfather and your mother and your relatives told you that this boy was related to you?

A. As soon as I was capable of understanding.

Q. And how long would that be, do you think? Two (2) or three (3) years old? A. Yes.

Q. Now, the only thing you know about the alleged relationship between the Plaintiff in this case and you is what somebody told you?

A. No.

Q. How else do you know?

A. That Lee Gnan Lung is my——

Q. (Interposing): What?

A. (Continuing): ——that Lee Gnan Lung is my consin because when I was a small boy he used to play with me.

Q. Well, you played with other boys, didn't you?

(Testimony of Lee Ngan.)

A. Yes, but he as a big brother to me.

Q. He is a big brother to you? Well, did you have any other Chinese boys that played with you that were big brothers to you?

A. Yes, but not big brothers and blood relatives.

Q. Well, you are just assuming that.

A. Yes.

Q. You know nothing about it of your own personal knowledge? [58] A. Of what, sir?

Q. Now——

The Court: He said of what?

Mr. Belcher: I beg your pardon.

A. No knowledge of what, sir?

Th Court: He didn't understand your last question.

Mr. Belcher: I misunderstood.

Q. (By Mr. Belcher): You don't know anything about the relationship between yourself and Lee Gnan Lung except what somebody else told you? A. And Lee Gnan Lung himself.

Q. Well, how does he know; do you know?

A. You mean how does he know——

Q. You don't even know of your own personal knowledge of when you were born, do you, except what somebody else told you?

A. Well, when a baby is born, I don't think he would know.

Q. Did you ever get a birth certificate?

A. Myself?

Q. Yes. A. No.

(Testimony of Lee Ngan.)

Q. How old was Lee Gnan Lung when you left China to come to the United States?

A. Well, then I was six (6) and he is nine (9) years my senior. [59]

Q. You talked this thing over with your parents and others connected with this case as to what your testimony was going to be here, haven't you?

A. Are you referring that I am told what to say?

Q. No, I am asking you if you talked it over with anybody?

A. Well, yes, we talk about the family all the time because the Chinese family is very closely related.

Q. And you discussed what your testimony was going to be here with them, did you not?

A. About——

Q. (Interposing): About what you were going to testify to in this case. A. Here?

Q. Yes.

A. Well, just what I know of him, Lee Gnan Lung.

Mr. Merges: He discussed it with the Plaintiff's attorney too, Mr. Belcher.

The Witness: Yes.

Mr. Merges: In some detail.

Mr. Belcher: That is all.

Mr. Merges: You may step down.

Mr. Belcher: Wait a minute.

Q. (By Mr. Belcher): Have you made any

(Testimony of Lee Ngan.)

trips back to China since you came here in [60] 1940? A. No, sir.

Q. You haven't been out of this country?

A. No, sir.

(Witness excused.)

Mr. Merges: Lee Hing. [61]

LEE HING

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Merges:

(Through the Interpreter previously sworn.)

Q. What is your name, address and occupation, please.

A. Lee Hing. I don't work now. I work at grocery sir.

Mr. Merges: Maybe you can testify in English. Do you want to try?

The Interpreter: He is going to testify in Chinese to be more accurate.

Q. (By Mr. Merges): How old are you?

A. Seventy (70).

The Court: Did you get the name?

The Interpreter: Lee Hing.

Q. (By Mr. Merges): What is your occupation? A. He is more or less retired now.

(Testimony of Lee Hing.)

Q. What was your occupation before retirement? A. Groceryman.

Q. Did you have occasion to visit China in the last few [62] years?

A. Since 1939 he hasn't been back.

Q. Did you make a trip to China in 1939?

A. Back to States.

Q. No, did you make a trip to China in 1939?

A. No, he wasn't.

Q. Pardon?

A. He is on his way back to the United States at that time.

Q. What time? Just ask him when he was last in China. Maybe we can simplify it.

A. He was in China in 1934 to '39.

Q. 1934 to 1939? A. That is right.

Q. Now, during that time did you ever visit Lee Kut's house? A. No, he hasn't.

Q. You never visited Lee Kut's house?

A. No, he hasn't.

Q. Do you know Lee Kut's family in China?

A. He knew Lee Kut's family because he was a visit—I mean Lee Kut's father visit him at one time.

Q. Did you ever see any of Lee Kut's children?

A. He said he have seen Mr. Lee Kut's son on several occasions.

Q. When did you see Lee Kut's son the last time? [63]

A. About fourteen (14) years ago.

Q. About fourteen (14) years ago. Showing you

(Testimony of Lee Hing.)

what has been marked Plaintiff's Exhibit 4, I will ask you if you can identify any of the persons in that picture?

A. He said he can recognize two (2) of those in the picture.

Q. Who are they?

A. One is Ngan, the fellow who testified before he did.

Q. Which one is he referring to when he said one is Ngan?

A. The small boy sitting on the pedestal.

Q. That is the small boy who just testified?

A. That is right.

Q. And who is on the extreme right?

A. In the dark clothes, Mr. Lee Gnan Lung.

Q. You weren't there at the time Lee Gnan Lung was born, were you? A. No, he wasn't.

Q. So the only thing you know about whether or not Lee Gnan Lung is Lee Kut's son is what somebody else told him?

A. He knows because his grandfather introduced him as his grandson.

Q. His grandfather introduced him as his grandson? A. Yes.

Q. Ask him if he is familiar with the customs in China? [64] A. Not too much.

Mr. Merges: All right; that is all.

Mr. Belcher: No questions.

(Witness excused.)

Mr. Merges: Lee Yick's wife. [65]

TOY SHE

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Merges:

(Through Interpreter)

Q. What is you name, please?

A. Toy She.

Q. Are you Lee Yick's wife? A. Yes.

Q. And Lee Yick is the brother of Lee Kut?

A. Yes.

Q. When were you married to Lee Yick?

A. She was married on the date of the Chinese Republic 17 years.

Q. That is 1928, isn't it?

A. All she remembers is 17 years of the Chinese Republic. That is all she knows.

Mr. Merges: I think we can stipulate it is 1928.

Mr. Belcher: Yes.

Q. (By Mr. Merges): When you were married to Lee Yick, did you meet all of Lee Yick's family?

A. Yes, she did.

Q. And did you live in the same village with Lee Kut's [66] family? A. Yes.

Q. (Continuing): After you were married?

A. Yes.

(Testimony of Toy She.)

Q. State whether or not Lee Kut had any children? A. She has one (1), Lee Gnan Lung.

Q. And showing you what has been marked Plantiff's Exhibit 3, is that Lee Kut's son?

A. Yes.

Q. How long did you live in the same village with this boy?

A. She says she lived in the same village with Mr. Lee Gnan Lung from the date of her marriage until her departure to the United States.

Mr. Merges: You may inquire.

The Court: Did she say when she came to this country?

The Interpreter: In the Chinese Republic, the 36th year.

Mr. Merges: That is 1948.

Mr. Belcher: 1947.

Mr. Merges: 1947.

The Court: Ask her if he was there when she left?

The Interpreter: She said Mr. Lee Gnan brought her out to Hong Kong. [67]

In other words, it is a custom to bring women folk out from the village to the big cities and he was the one who brought her out in preparation for the trip to the United States.

Mr. Merges: That is all.

(Testimony of Toy She.)

Cross-Examination

By Mr. Belcher:

Q. You don't know of your own knowledge that Lee Gnan Lung is the son of Lee Kut?

A. She said that she knows. She said she knows that not as far as her knowledge is concerned, but she knows he is her son.

Q. How does she know that?

A. She said Mrs. Lee Kut told her.

Q. That is the only—you weren't there at the time that the child was born?

A. Not yet. She wasn't married then.

Q. You have never seen any birth certificate issued by the Chinese? A. No.

Mr. Belcher: That is all.

Mr. Merges: That is all.

(Witness excused.)

Mr. Merges: That is our case, if your Honor please.

Mr. Belcher: May I have the last witness back for just a moment? [68]

The Court: The last witness may come back.

(Witness resumes stand.)

Q. (By Mr. Belcher): Did I understand you to say that you met all of Lee Kut's relatives, met Lee Kut, at your wedding in 1928?

A. Yes, she says she knows Mr. Lee Kut after or during her marriage.

(Testimony of Toy She.)

Q. Don't you know that Lee Kut was not in China in 1928?

A. She was introduced to Mr. Lee Kut's wife and his immediate family, but not Mr. Lee Kut himself.

Q. Mr. Lee Kut was in the United States at that time, was he not?

A. Yes, she heard that he was in the United States at that time.

Mr. Belcher: That is all.

Mr. Merges: That is all. Step down.

(Witness excused.)

Mr. Merges: That is our case, if your Honor please.

The Court: You have no proof.

Mr. Belcher: No, your Honor.

I think the evidence is wholly insufficient to grant the relief prayed for.

It is based entirely upon hearsay. No direct evidence at all of the birth of this child and, further than that, it seems strange [69] that no effort was made to bring this alleged child to the United States until he reached the age of twenty-seven (27) years, although there was plenty of opportunity to do so.

The Court: I might ask you this, Mr. Belcher: What testimony do you think there would be to establish the birth?

Mr. Belcher: I think, if your Honor please, that this is one case in which the blood grouping test would be proof positive, and before this case is de-

ermined by your Honor, if in the event of our enial of the motion to dismiss because of the lack f sufficient evidence, that the Court in this case hould order a blood grouping test, particularly in iew of the fact that one of the witnesses testified ere it is the Chinese custom to adopt and take in hildren.

The Court: It is the custom in this country to o that too.

Mr. Belcher: I realize that. I say, there is no irect evidence here at all that this man is the ather of this child. It is all hearsay, every bit of it.

The Court: Isn't that true of most people except where you have birth certificates?

Mr. Belcher: Pardon?

The Court: Isn't that true in most cases except where you have birth certificates?

Mr. Belcher: No. I think, as your Honor knows, n some of these Chinese cases they have introduced irth certificates. [70]

The Court: What if they haven't any?

Mr. Belcher: The burden is upon them; not us.

The Court: The Court thinks it is proved and rants the Petition.

Mr. Belcher: I didn't hear.

The Court: The Court thinks the proof is sufficient.

Mr. Belcher: And the Court refuses to or-er——

The Court: (Interposing) I see no occasion to rder it unless you have some other showing than uess work. I don't think it is sufficient to say lack

of a birth certificate is proof of your position. There is nothing else you have offered at all.

Mr. Belcher: Well, there is no showing here, if your Honor please, and there has been no positive proof here, of citizenship, and the burden is entirely upon the Petitioner.

The Court: I grant that, but the statute provides for this action. What kind of proof is the Court supposed to have? The Court realizes that there can be situations where a person is an imposter and not a true son, but at the same time is the Court to listen to witnesses and assume that they are not telling the truth?

Maybe the Court is under some misapprehension and maybe the statute should be changed, but when an action like this is filed and these people get on the stand and they are citizens and they take the oath and the presumption is that they understand then they testify, granted it is hearsay, but there are many, many people, most [71] of the people in the world, whose birth must be proved by hearsay, and that type of hearsay testimony is acceptable.

Mr. Belcher: The father and mother are the only two (2) people that could testify to that.

The Court: The father can't testify if he isn't there and the mother is dead.

The fact that the mother died—the Court doesn't wish to get into a debate, but it appears to the Court that if the mother is dead—and there is no other person who can testify of personal knowledge, whether it be a doctor or midwife, whoever it may be, you say that that isn't sufficient showing; or, on

the part of the Government in a case of this character, merely to show that there is no one else who can say that they know that the son——

Mr. Belcher: Well, I would like to have the record show that I ask the Court, under Rule 35, for a blood test, a blood grouping test, which would be proof positive of the lack of parentage, and that is our defense here—that there is no identification. This would be a very good case to have the Court of Appeals determine.

The Court: I think it may be. I think in regard to your last motion the record may so show. I think it is not timely and the Court will say that the testimony is not such as to warrant the Court, on its own motion, to ask for that test.

Frankly, I will say this: These cases are a problem to the Court. Recognizing that situations may present themselves where persons other than sons of citizens will contend to be such, [72] unless the Government has something more to establish that, I don't think the Court is in a position to presume that these witnesses are not telling the truth.

Mr. Belcher: Of course, I go on the hearsay.

The Court: We will recess until two (2:00) o'clock.

(Whereupon, at 12:10 o'clock, p.m., a recess was had until 2:00 o'clock p.m., October 22, 1952, at which time, Counsel heretofore noted being present, the following proceedings were had, to wit):

Mr. Belcher: Before your Honor signs that, I would like to call your Honor's attention to Judge

Roche's decision. It isn't in the advance sheets.

The Court: I assume this order was entered, Mr. Belcher, upon a motion and not upon conclusion of the testimony of the Plaintiff.

Mr. Belcher: As I explained to your Honor this morning, when we were discussing this matter yesterday, Mr. Merges and I, I understood that the grandmother was in China at the time of the birth of the child and would have first-hand knowledge of the birth. It developed for the first time this morning that she wasn't there until two (2) years afterwards and I made my motion at the first opportunity.

The Court: Well, it would appear to me, Mr. Belcher, that the testimony given in this matter this morning, there [73] having been no Answer, the Court recognizing that the Petitioner in all these cases has the burden of establishing his identity, that the proof is sufficient to establish a prima facie case, if not to establish conclusively the identity, and if the only thing that the Government would have in opposition would be possible evidence that may result from physical examination or blood grouping test, as I understand——

Mr. Belcher: That is correct, your Honor.

The Court: (Continuing) ——that wouldn't be sufficient to warrant the Court's delaying in making a finding on the evidence as adduced, recognizing that in these paternity cases, or in establishing birth, that hearsay is acceptable. I haven't checked the law on it, but it is my recollection that hearsay is acceptable, or, it is not subject to the ordinary

objection that it may be hearsay testimony, when it relates to the birth of a child. Isn't that correct?

Mr. Merges: That is correct, your Honor.

Mr. Belcher: In the ordinary case, I think that is the rule.

The Court: So that the testimony is admissible and recognizing that we had the alleged father and alleged grandmother and alleged uncle and cousin and aunt——

Mr. Merges. (Interposing) And nephew.

The Court: (Continuing) ——and nephew, all having been over to China and having seen this individual, it would seem to the Court that that is rather persuasive testimony, unless there is something to show that it is falsified. [74]

Mr. Belcher: That is the purpose of the blood grouping test. Blood grouping tests will disprove paternity but it will not prove it.

The Court: I understand that. I am not familiar with how reliable it is, but I am familiar with the theory.

Mr. Belcher: I just thought I would call it to your attention.

The Court: The record may show that you make the request but if the testimony as given this morning is not sufficient I think that the Court should know about it on appeal.

Mr. Belcher: I think so too. I think this is a very good case to test out and have a ruling from the Court of Appeals.

The Court: The Court certainly isn't an expert in these Chinese cases but still I think the testi-

mony of the Chinese citizen is entitled to the same credibility as any other person.

Mr. Belcher: Off the record, I might say for your Honor's information that there have been a great many frauds found in California in these Chinese cases and there is a considerable backlog of them.

The Court: That may be true. I am aware of the magazine articles and so on, but I don't think the Court could take judicial notice of that and order blood grouping tests. We had this down for pre-trial. I think when they want that that that should be requested at the pre-trial.

Have you checked the form of this [75] judgment?

Mr. Belcher: Yes.

There was no pre-trial in this case.

The Court: I would suggest that if the Government wishes that, then they should ask it at the time of pre-trial.

Mr. Merges: I think, if your Honor please, with regard to the blood grouping test, when the motion is made on that and the issue is properly presented to the Court, I will present the authorities, but there is a very serious question as to whether or not the Court can properly order it, but that hasn't been presented in this case.

The Court: The Court has had one motion and referred action on that to pre-trial in another case.

Mr. Belcher: That is right.

(Whereupon, hearing was concluded.) [76]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court hereby certify that the foregoing is a full, true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed February 9, 1953. [77]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above-entitled action as the record on appeal herein (excluding exhibits) from the Decree and Adjudication of Citizenship, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, said papers being identified as follows:

1. Complaint, filed Feb. 19, 1952.

2. Marshal's Return on Summons, filed Feb. 20, 1952.

3. Marshal's Return on Service of Summons, filed Mar. 3, 1952. (Secretary of State)

4. Appearance of J. Charles Dennis and John E. Belcher as Attorneys for United States, filed Mar. 21, 1952.

5. Motion of Plaintiff and Affidavit for an Order to Show Cause, filed Mar. 21, 1952.

6. Order to Show Cause, filed Mar. 21, 1952.

7. Marshal's Return on Order to Show Cause, filed Apr. 4, 1952.

8. Marshal's Return on Service (Sec. of State) of Order to Show Cause, filed Apr. 14, 1952.

9. Return to Order to Show Cause, filed Apr. 25, 1952.

9-A. Defendant's Memorandum, filed May 2, 1952.

10. Order Directing Defendant to Issue Travel Document in Accordance with Section 503 of the Nationality Act of 1940, filed May 5, 1952.

11. Marshal's Return on Service of Order Directing Defendant to Issue Travel Document in Accordance With Section 503 of the Nationality Act of 1940, filed May 19, 1952.

12. Defendant's Motion for Stay or Recall of Order, filed July 2, 1952.

13. Order Upon Motion to Stay, filed July 14, 1952.

14. Order to Show Cause, filed July 14, 1952.

15. Affidavit in Support of Motion for Order to Show Cause, filed July 14, 1952.

16. Marshal's Return on Service of Order to Show Cause, (Sec. of State) filed July 29, 1952.

17. Findings of Fact and Conclusions of Law, filed Oct. 22, 1952.

18. Decree and Adjudication of Citizenship, filed Oct. 22, 1952.

19. Notice of Appeal, filed Dec. 18, 1952.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal in this cause, to wit:

Notice of Appeal, $5.00,

and that said amount has not been paid to me for the reason that the appeal in said cause is being prosecuted by the United States.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 21st day of January, 1953.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith supplemental to the record on appeal herein the following additional papers or documents:

20. Statement of Points to Be Relied Upon on Appeal, filed by Defendant Feb. 2, 1953.

21. Stipulation and Order Transferring Exhibits, filed 2/2/53.

22. Court Reporter's Transcript of Trial Proceedings, filed Feb. 9, 1953.

Plaintiff Exhibits numbered 1, 2, 3, 5 and 6.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 9th day of February, 1953.

[Seal] /s/ MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13695. United States Court of Appeals for the Ninth Circuit. John Foster Dulles, Secretary of State of the United States of America, Appellant, vs. Lee Gnan Lung, by his next friend Lee Kut, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed January 23, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13695

DEAN C. ACHESON, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, By His Next Friend LEE KUT,

Appellee.

CONCISE STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant hereby adopts the concise statement of points to be relied upon on appeal heretofore filed with the Clerk of the District Court for the Western District of Washington.

Dated at Seattle this 10th day of February, 1953.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed February 14, 1953.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Appellant hereby designates the following from the record to be printed:

1. Complaint.
2. Motion and affidavit for order to show cause.
3. Order to show cause.
4. Return to order to show cause.
5. Order directing defendant to issue travel document.
6. Affidavit of Edwards E. Merges dated July 14, 1952.
7. Motion for stay or recall of order directing issuance of travel document.
8. Order denying motion for stay.
9. Findings of Fact and Conclusions of Law.

10. Judgment.
11. Notice of Appeal.
12. Concise statement of points on appeal.
13. Designation of record to be printed.
14. This designation of record.
15. Reporter's transcript of the testimony.
16. Stipulation and order transferring exhibits.
17. Concise statements of points on appeal, this Court.
18. Stipulation and order for substitution of John Foster Dulles as appellant.

Dated this 10th day of February, 1953.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed February 14, 1953.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER FOR SUBSTITUTION OF PARTY APPELLANT

It is hereby agreed by and between counsel for appellant and appellee that Dean G. Acheson has resigned as Secretary of State of the United States

of America and John Foster Dulles has been appointed and has qualified and is now the Secretary of State of the United States of America, wherefore

It Is Hereby Stipulated that the said John Foster Dulles be substituted as appellant herein in the place and stead of said Dean G. Acheson.

Dated this 10th day of February, 1953.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

/s/ EDWARDS MERGES, LMG,
Attorney for Appellee.

Order

Upon the foregoing stipulation, it is Ordered that John Foster Dulles be, and he is hereby, substituted for Dean G. Acheson, as appellant herein.

/s/ CLIFTON MATHEWS,
/s/ WILLIAM HEALY,
/s/ WALTER L. POPE,
Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed February 17, 1953.

No. 13695

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 4/9/53 — 45 COPIES

No. 13695

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 4/9/53 — 45 COPIES

INDEX

CASES CITED

Page

STATUTES

United States Code

Federal Judicial Code

Code of Federal Regulations

No. 13695

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction of the district court and this court is conferred by Sec. 903, Title 8, U.S.C.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court declaring appellee, a native born Chinese 27 years of age who has never been in the United States, to be a citizen of the United States by reason of being the son of an American citizen. The action was commenced against Dean Acheson, but John Foster Dulles has been substituted in this court.

Appellee alleges in his complaint, which was filed in the district court by Lee Kut as his next friend *while appellee was still in China*, that he is a citizen of the United States, and brings this suit through his father Lee Kut also a citizen of the United States and a resident of King County, State of Washington; that he was born at Wah Lum Village, China on September 15, 1926. (R. 3, 4)

It is also alleged that appellee is a citizen of the United States under Section 1993 of the Revised Statutes (8 U.S.C. 6) as amended by Section 201(g) of the Nationality Act of 1940, 8 U.S.C. 601(a); that the alleged father Lee Kut is also a citizen of the United States and his citizenship has been recognized and conceded by the Immigration Service at the Port of Seattle, on several occasions; that the permanent residence of Lee Kut is in Seattle, where he is engaged in the laundry business, and that appellee has

and claims his permanent residence in the City of Seattle *(although he has never at any time been in this country)*.

It is further alleged that Lee Kut was legally married to Lew Shee on November 28, 1925 and that appellee was the lawful issue of said marriage; that in February 1951 Lee Kut caused to be prepared an identification affidavit stating his relationship to appellee and all of the particulars concerning him for the purpose of securing from the American Consul General in Hong Kong a travel document to enable appellee to travel to the United States, which document it is alleged was filed with said American Consul, but that the *Consul failed to and neglected to take any action thereon;* that on October 11, 1951 the Consul wrote a letter, stating appellee had been interviewed at the office of the American Consul but *appellee had not presented sufficient evidence to enable the Consul to issue him a final document and that it was indefinite when any travel document would be issued* because *there were approximately 1800 cases ahead of appellee's application;* that there existed no good reason for such delay because appellee had submitted adequate and competent evidence of his citizenship and right to come to the United States and that the *American Consul*, upon information and belief of appellee, *had no intention of issuing appellee*

a travel document; that a year was an unreasonable time; that appellee's right to a travel document could be determined on a basis of the affidavit submitted; that the action of the American Consul has been referred or appealed to the Secretary of State upon information and belief of appellee. It is further alleged that appellee was informed and believed that *no action would be taken upon his application,* and that if *any action is taken, it would be unfavorable.*

The prayer was that an order be issued directed to the defendant (appellant) to issue a travel document; that a decree be entered adjudging appellee to be a citizen of the United States. (R. 7)

On March 21, 1952 appellee filed a motion for an order to show cause which was issued directing appellant to show cause, April 28, 1952 why he should not be required to issue such a travel document.

To this order to show cause appellant, through the United States Attorney, filed a return in which a telegram from the Attorney General was set out as follows:

> "Lituated April 4, 1952, re *Lee Gnan Lung v. Acheson.* State Department advised us plaintiff has not appealed to Secretary for certificate, therefore administrative remedies have not been exhausted."

The return further set forth a letter from the Secre-

tary of State reading in part:

> "* * * case *Lee Gnan Lung* (civil action 3010) * * * application being processed by Consul General in Hong Kong at present time."

The return further set forth:

> "That because of the pendency of plaintiff's application before Consul General, Hong Kong, and there being no refusal to process the same, the action is premature, and there having been no appeal to the Secretary of State, plaintiff has not exhausted his administrative remedy."

The prayer was that the action be dismissed and the rule to show cause discharged. (R. 12)

After the hearing and on May 5, 1952 the court entered an order directing appellant to issue a travel document. (R. 13-14)

On July 2, 1952, appellant filed a motion for a stay of the order directing the issuance of the travel document supported by the affidavit of an Assistant United States Attorney, and thereafter and on July 14, 1952 a motion was filed by appellee seeking an order to show cause why the Secretary should not be adjudged in contempt for his refusal to issue said travel order. (R. 21) Appellant's motion for a stay was denied July 14, 1952. (R. 22)

Appellee's counsel thereafter desired to proceed to the determination of the issue presented in the

absence of appellee with the understanding that the defense would constitute a general denial without a formal pleading and the defense of lack of exhaustion of administrative remedy. The matter was heard before the court October 22, 1952, at which time witnesses on behalf of appellee were called and testified, to-wit: Lam Gnan, alleged grandmother, Lee Yik, alleged uncle, Lee Gnan, alleged nephew, Lee Hing, Toy Shee, alleged aunt of appellant and the wife of Lee Yik, and Lee Kut, the alleged father.

Not one witness testified to anything but heresay, as will be hereafter set out.

THE PROCEEDINGS

Before setting out the evidence adduced and in relation to the issues, the following is quoted from the record: (R. 32)

MR. MERGES:

> The background of this matter is — a brief summary may be helpful to the court.
>
> The background of this matter is that the applicant's father in this case is a resident of Seattle. He operates a wholesale laundry business here with his brother called the Star Laundry. They do laundry in wholesale quantities for various hotels in the city.
>
> As a result of a trip to China in 1925 there was born to him a son named Lee Gnan Lung.
>
> The immigration authorities have written a

letter, or summary, of the investigation of the file of the applicant's father, which we will ask to be read into the record, in order to save time, in which the immigration people advise that the *applicant's father was in China in time to make his paternity of this boy possible,* and also this file shows that upon examination by the immigration officers upon his return to the United States from China — *the boy was born after he arrived here,* but, upon a subsequent examination in some immigration proceedings, I don't remember which it was he mentioned this boy.

The affidavit was filed by Lee Kut, who is the father, in March, 1951.

* * *

The Government made a motion in this case. We secured a show cause order and the court entered an order directing issuance of a travel document.

The Government resisted that rather strenuously and briefs were filed and the travel document was never issued.

The Government then, in July of this year, made a motion to stay the order directing issuance of the travel document which was denied on the 14th of July, 1952.

We then made a motion to hold the defendant, Dean Acheson, in *contempt of court* for his failure to comply with the order of the court, and the court indicated at first that he felt that the defendant was in contempt of court and later the court indicated that he had deviated from the decision and felt serious doubts as to whether or not he had jurisdiction to hold the defendant in contempt of court, and direct him to issue a travel document.

THE COURT:

That was probably in accordance with Judge Goodman's decision. (R. 34)

* * *

MR. MERGES:

The question in this case is that the consul has just not acted one way or another about it and this affidavit was filed back in February, 1951. (R. 36)

MR. BELCHER:

I might say, if your honor please, that the the position of the Department is that this action is somewhat premature in view of the fact that *one of the essential allegations in the complaint is that they have been denied the right or privilege of an American citizen.*

The status of the nationality of the applicant has not yet been determined by the consul. (R. 38)

* * *

THE COURT:

That was denied was it not?

The motion to dismiss was denied?

MR. BELCHER:

I take it that it was, but no formal order was entered.

MR. MERGES:

There was an order entered July 10, 1952. (R. 39)

THE EVIDENCE

Lee Kut, the alleged father, testified that he was married to Lew Shee according to the Chinese custom, that as the lawful issue of that marriage there were three children born to the parties. (R. 43)

Q. When was the boy, who is the subject of this action, Lee Gnan Lung born?

A. He was born in 1926.

Q. When did you make a trip to China?

A. I made that trip to China in 1925.

Q. And you were still married to Lew Shee at that time?

A. Yes, sir.

Q. And your boy, Lee Gnan Lung, was born as a result of that trip: is that correct?

A. That is correct. (R. 43)

(Lee Kut returned from China before the boy was born and was in the United States when it is alleged the child, Lee Gnan Lung was born.)

On cross-examination Lee Kut testified:

Q. You say you are anxious to have the boy with you?

A. Yes, sir.

Q. How long have you been anxious to have him with you?

A. *Well, since China was occupied by the Communists.*

Q. Well, he is — How old is he now?

A. He is twenty-seven (27) this year.

Q. But when did he finish ordinary school?

A. Oh, ordinary school, in China that would require about six (6) to nine (9) years, that would be when he was around fifteen (15). (R. 52)

Q. You made no effort to get him here after he had completed school?

A. No. *I made no effort because his grandfather was born then (there); his grandfather was alive then.*

Q. And how long has his grandfather been dead?

A. His grandfather died in 1941. (R. 52)

Q. *You were not present in China at the time this boy was born?*

A. No sir.

Q. So what you know about his birth somebody told you?

A. No. Oh, the birth, someone told me, yes.

Q. Yes, and what is your means of identification of him?

A. *Of my means of identification of him is when I made that trip in 1934.* His means of identity, *why I wouldn't say he looks exactly like me, but there are a few resemblances that he looks like me.* (R. 53)

Lam Gnan, the alleged grandmother of appellee was called and (R. 56) through Lim Lee, an interpreter, testified that she came to the United States from China in 1913, and went back to China eight

years later (1921); stayed in China five or six months; and went back to China in 1928. *(She was not in China, when the alleged son, the appellee, was born.)* She is the mother of Lee Kut, the alleged father of appellee. She testified that she lived on one side of the house occupied by the wife of Lee Kut and Lee Kut's wife lived on the other side *with a two year old boy named Lee Gnan Lung* (R. 59). She remained in China several months. She identified a picture (Ex. 3) of Lee Gnan Lung.

On cross-examination she testified:

Q. How do you know he (Lee Gnan Lung) is your grandson?

A. Because she has seen him several times.

Q. Who told you? Did somebody tell you that he was your grandson?

A. (by interpreter) She says she recognizes him.

Q. How could you? How do you recognize him?

A. (by interpreter) She has seen him several times in the past when he was a baby she saw him then on several trips she saw him. (R. 61)

Q. *Were you there when he was born?*

A. (by interpreter) *She was not.*

Q. Do you know when he was born?

A. September, 15th of September.

Q. What year?

A. 1926.

Q. How do you know that?

A. Mrs. Lee Kut sent her a letter and told her about it.

Q. Have you got that letter?

A. (by interpreter) No, she hasn't. She said she read the letter and kept it a while and then it disappeared among her belongings.

Q. Do you know whether or not in China it is a custom for the Chinese people to take other children into their homes?

A. (by interpreter) Yes, she does, she knows.

Q. And is that the custom?

A. Yes. (R. 62)

Lee Yick, the brother of Lee Kut (and the alleged uncle of Lee Gnan Lung) testified as follows:

Q. Did you make a trip to China in 1928?

A. Yes, sir.

Q. When you went to China, did you go to your brother Lee Kut's house?

A. Yes, sir.

Q. What was the purpose of your going there?

A. At that time my father and my mother and I went back to China and we visited my brother's wife and *my brother's wife told me that Lee Gnan Lung is my brother's son.* (R. 68)

Q. And then you went back to China in 1928 for the purpose of getting married?

A. Yes, sir.

Q. How long did you remain in China?

A. About nine (9) months.

The witness made another trip to China, staying nine months again in 1934 and *again stayed nine months* again in 1939 and by coincidence then *stayed nine months again*, on each of which trips he saw Lee Gnan Lung. (R. 70)

On cross-examination:

Q. *You were not in China at the time — you were not in China on February 15, 1926 were you?*

A. No, sir.

Q. Did you ever see any birth certificates?

A. No, sir.

Q. (continuing) showing the birth of Lee Gnan Lung?

A. No, sir. (R. 71)

Q. So that the only knowledge you have as to when he was born is this statement made to you by somebody else; is that correct?

A. What statement?

Q. Somebody told you that he was?

A. Yes, my brother's wife told me.

Q. And that is the only information you have on the subject.

A. Yes. (R. 71)

A photograph was shown the witness and he identified appellee in the photograph.

Lee Ngan, the son of Lee Yik, who came to this country from China in 1940 was called and testified. (R. 74)

Q. Prior to the time you landed here in 1940, where did you live?

A. In China, sir.

He testified that he lived with his mother in his father's house.

Q. Now, your uncle, Lee Kut, did he have any children?

A. Yes sir. (R. 75)

Q. Did he have a son named Lee Gnan?

A. Yes, sir.

Q. Did you live in the same village with that son from the time you were born?

A. Yes, sir.

The witness was shown a photograph and identified Lee Gnan Lung. (Ex. 4) The small boy in the middle of the picture was identified as the witness.

Q. How old were you then?

A. Oh, six (6) I believe.

Q. How old are you now?

A. Now, I am eighteen (18). (R. 75)

On cross-examination, this witness testified:

Q. And who told you that he was your — re-related to you in any way?

A. My grandmother, my uncle, my father and my mother and the villagers. (R. 77)

Q. And that is the extent of your knowledge?

A. Also my grandfather.

Q. Now, in 1940, you were approximately six (6) years old?

A. Yes, sir.

Q. When was it that you say your grandfather and your mother and your relatives told you that this boy was related to you?

A. As soon as I was capable of understanding.

Q. How long would that be, do you think, TW0 (2) OR THREE (3) years old?

A. Yes.

Q. Now, the only thing you know about the alleged relationship between the plaintiff in this case and you is what somebody told you?

A. No.

Q. How else do you know?

A. *That Lee Gnan Lung is my cousin because when I was a small boy he used to play with me.* (R. 77)

Lee Hing (through an interpreter) testified as follows: (R. 80)

Q. How old are you?

A. Seventy (70).

Q. Did you have occasion to visit China in the last few years?

A. (by interpreter) Since 1939 he hasn't been back.

Q. Did you make a trip to China in 1939?

A. Back to States.

Q. No, did you make a trip to China in 1939?

A. (by interpreter) No, he wasn't. He is on his way back to the United States at that time.

Q. What time? Just ask him when he was last in China. Maybe we can simplify it.

A. (by interpreter) He was in China in 1934 to '39.

Q. Did you ever see any of Lee Kut's children?

A. (by interpreter) He said he have seen Mr. Lee Kut's son on several occasions.

Q. When did you see Lee Kut's son the last time?

A. About fourteen (14) years ago.

He was handed the group photograph (Ex. 4) and asked if he could recognize or identify any of the persons therein.

A. (by interpreter) He said he can recognize two (2) of those in the picture.

Q. Who are they?

A. One is Gnan, the fellow who testified before he did.

Q. Which one is he referring to when he said one is Gnan?

A. The small boy sitting on the pedestal.

Q. And who is on the extreme right?

A. In the dark clothes, Mr. Lee Gnan Lung.

Q. You weren't there when Lee Gnan Lung was born were you?

A. (by interpreter) No, he wasn't.

Q. So the only thing you know about whether or not Lee Gnan Lung is Lee Kut's son is what somebody else told him?

A. (by interpreter) He knows because his grandfather introduced him as his grandson. (R. 82)

Toy She (the wife of Lee Yik (R. 67) was called as a witness and testified. (R. 83)

She testified she was married to Lee Yik in China in 1928 and came to the United States in 1947. (R. 84)

Q. When you were married to Lee Yik, did you meet all of Lee Yik's family?

A. (by interpreter) Yes she did.

Q. And did you live in the same village with Lee Kut's family?

A. Yes.

Q. After you were married?

A. Yes.

Q. State whether or not Lee Kut had any children.

A. (by interpreter) She has one (1), Lee Gnan Lung.

Q. How long did you live in the same village with this boy?

A. (by interpreter) She says she lived in the same village with Mr. Lee Gnan Lung from the date of her marriage until her departure to the United States.

THE COURT:

Did she say when she came to this country?

THE INTERPRETER:

In the Chinese Republic, the 36th year.

MR. MERGES: That is 1948.

MR. BELCHER: 1947.

MR. MERGES: 1947.

THE COURT:

Ask her if he was there when she left?

THE INTERPRETER:

She said Mr. Gnan brought her out Hong Kong.

On cross-examination:

Q. You don't know of your own knowledge that Lee Gnan Lung is the son of Lee Kut?

A. (by interpreter) She said that she knows. She said she know that *not as her knowledge is concerned*, but she knows he is her son.

Q. How does she know that?

A. She said Mrs. Lee Kut told her. (R. 85)

MR. MERGES:

That is our case, if your honor please.

THE COURT (addressing government counsel) You have no proof?

MR. BELCHER:

No, your honor. I think the evidence is wholly insufficient to grant the relief prayed for. It is based entirely on hearsay. No direct evidence at all of the birth of this child and, further than that, it seems strange that no effort was made to bring this alleged child to the United States until he reached the age of 27 years, although there was plenty of opportunity to do so.

THE COURT:

I might ask you this, Mr. Belcher: What testimony do you think there would be to establish the birth?

MR. BELCHER:

I think, if your honor please, that this is one case in which the blood grouping test would be proof positive, and before this case is determined by your honor, if in the event of your denial of the motion to dismiss because of the lack of sufficient evidence, that the court in this case should order a blood grouping test, particularly in view of the fact that one of the witnesses testified here it is the Chinese custom to adopt and take in children. (R. 86-87)

THE COURT:

It is the custom in this country to do that, too.

MR. BELCHER:

I realize that. I say, *there is no direct evidence* here at all that this man is the father of this child. *It is all hearsay, every bit of it.*

THE COURT:

Isn't that true of most people except where you have birth certificates?

MR. BELCHER:

No. I think, as your honor knows, in some of these Chinese cases they have introduced birth certificates.

THE COURT:

What if they haven't any?

MR. BELCHER:

The burden is upon them, not us.

THE COURT:

The court thinks it is proved and grants the

petition. (R. 87)

MR. BELCHER:

And the court refuses to order—

THE COURT:

(interposing) I see no occasion to order it unless you have *some other showing than guess work.* I don't think it is sufficient to say lack of a birth certificate is proof of your position. There is nothing else you have offered at all.

MR. BELCHER:

Well, there is no showing here, if your honor please, and there has been no positive proof here, of citizenship, and the burden is entirely on the petitioner.

THE COURT:

I grant that, but the statute provides for this action. What kind of proof is the court supposed to have? The court realizes that there can be situations where a person is an imposter and not a true son, but at the same time is the court to listen to witnesses and assume that they are not telling the truth?

Maybe the court is under some misapprehension and maybe the statute should be changed, but when an action like this is filed and these people get on the stand and they are citizens and they take the oath and presumption is that they understand then they testify, *granted it is hearsay,* but there are many, many people, most of the people in the world whose birth must be proved by hearsay, and that type of hearsay testimony is acceptable.

MR. BELCHER:

The father and mother are the only two people that could testify to that.

THE COURT:

The father can't testify if he isn't there and the mother is dead. The fact that the mother died — the court doesn't wish to get into a debate, but it appears to the court that if the mother is dead — and there is no other person who can testify of personal knowledge, whether it be a doctor or midwife, whoever it may be, you say that that isn't sufficient showing; or, on the part of the Government in a case of this character, merely to show that there is no one else who can say that they know that the son—

MR. BELCHER:

Well, I would like to have the record show that I ask the court, under Rule 35, for a blood test, a blood grouping test, which would be proof positive of lack of parentage, and that is our defense here — that there is no identification. This would be a very good case to have the Court of Appeals determine. (R. 89)

THE COURT:

I think it may be. I think in regard to your last motion the record may so show. I think it is not timely *and the court will say that the testimony is not such as to warrant the court, on its own motion, to ask for that test.*

Frankly, I will say this: These cases are a problem to the court. Recognizing that situaations may present themselves where persons other than sons of citizens will contend to be such, unless the government has something more to establish that, I don't think the Court is in position to presume that these witnesses are not telling the truth. (R. 89)

MR. BELCHER:

Of course, I go on the hearsay.

A recess was taken until 2:00 p. m. Upon the reconvening of the court at 2:00 p. m. counsel presented his proposed findings, conclusions and decree.

MR. BELCHER:

Before your honor signs that, I would like to call your honor's attention to Judge Roche's decision (see appendix "A") It isn't in the advance sheets.

THE COURT:

I assume this order was entered, Mr. Belcher, upon motion and not upon conclusion of testimony of the plaintiff. (R. 90)

MR. BELCHER:

As I explained to your honor this morning, when we were discussing this matter yesterday, Mr. Merges and I, I understood that the grandmother was in China at the time of the birth of the child and would have first hand knowledge of the birth. It developed for the first time this morning that she wasn't there until two years afterwards and I made my motion at the first opportunity.

THE COURT:

Well, it would appear to me, Mr. Belcher, that the testimony given in this matter this morning, there having been no answer, *the Court recognizing that the petitioner in all these cases has the burden* of establishing *his identity*, that the proof is sufficient to establish a *prima facie case*, if not to establish conclusively *the identity*, and if the only thing that the Government would have in opposition would be possible evidence that may result from physical examination or blood grouping test, as I understand—

MR. BELCHER:

That is correct, your honor.

THE COURT:

(continuing) — that shouldn't be sufficient to warrant the court's delaying in making a finding on the evidence as adduced, recognizing that in these paternity cases, or in establishing birth, that hearsay is acceptable. (R. 90). *I haven't checked the law on it,* but it is my recollection that hearsay is acceptable, or is not subject to the ordinary objection that it is hearsay testimony, when it relates to the birth of a child. Isn't that correct?

MR. MERGES:

That is correct your honor.

MR. BELCHER:

In the ordinary case, I think that is the rule. (R. 91)

(The court missed the point — the hearsay is not as to birth, but as to *identity.)*

MR. BELCHER:

That is the purpose of the blood grouping test. *Blood grouping tests will disprove paternity* but it will not prove it.

THE COURT:

I understand that, I am not familiar with how reliable it is, but I am familiar with the theory.

MR. BELCHER:

I just thought I would call it to your attention.

THE COURT:

The record may show that you make the request but if the testimony as given this morning is not sufficient I think that the court should know about it on appeal. (R. 91)

THE FINDINGS

The court thereupon entered the following findings of fact and conclusions of law:

I.

That Lee Kut, the father of plaintiff Lee Gnan Lung, is a citizen of the United States, an honorably discharged veteran of World War II and a resident of Seattle, King County, Washington.

II.

That the defendant is the duly appointed, qualified and acting Secretary of State of the United States of America.

III.

That the plaintiff, Lee Gnan Lung, was born in China at Wah Lum Village, Hoy Shan District, on September 15, 1926, and was the lawful issue of the marriage of Lee Kut and his wife Lew Shee, who is now deceased.

IV.

That in February 1951 the plaintiff's father, Lee Kut, caused to be prepared an identification affidavit, stating his relationship to the plaintiff, and all the particulars concerning the same and that said affidavit was prepared for the purpose of securing from the American Consul at Hong Kong a travel document to enable plaintiff

to travel to the United States; that said identification affidavit was filed with the American Consul but that the American Consul failed to grant the plaintiff a travel document.

V.

That it was not possible for the plaintiff to be personally present in court by reason of the failure of the defendant to issue plaintiff a travel document to enable him to come to the United States.

VI.

That the paternal grandmother, his paternal uncle, paternal cousin and other witnesses have all testified affirmatively to the relationship in question and the court finds that Lee Gnan Lung is the *foreign born blood son of Lee Kut*, born in lawful wedlock.

From the foregoing findings of fact the court makes the following

CONCLUSIONS OF LAW

I.

That plaintiff is entitled to the entry of a decree adjudging him to be a citizen of the United States in accordance with Section 503 of the Nationality Act of 1940. (R. 24-25)

A decree was entered on October 22, 1952 in accordance with the findings and conclusion. (R. 26-27)

Notice of appeal was filed December 18, 1952. (R. 28)

ASSIGNMENT OF ERRORS

The District Court erred in the following particulars:

1. The court erred in refusing to dismiss plaintiff's complaint for lack of jurisdiction.

2. The court erred in its order directing the defendant to issue to plaintiff a travel order entitling plaintiff to travel to the United States to prosecute this action.

3. The court erred in denying defendant's motion to stay its order for travel document.

4. The court erred in denying defendant's motion for a blood grouping test.

5. The court erred in holding the evidence sufficient to establish American citizenship in plaintiff.

6. The court erred in entering a decree declaring plaintiff to be an American citizen. (R. 29)

SUMMARY OF ARGUMENT

On the first point—refusal to dismiss. This assignment is based upon two grounds.

(A) At the time of trial the American Consul at Hong Kong had not completed his investigation

and *appellee had therefore not been denied any right as an American citizen.*

(B) That until such denial had been made the district court acquired no jurisdiction.

On the second assignment, the district court was entirely without jurisdiction to direct the defendant Secretary of State to issue a travel document.

On the third assignment, the district court should have granted appellant's motion to stay its order requiring appellant to issue a travel document.

On the fourth point, there being no valid proof of identity, the court erred in denying appellant's motion for an order requiring a blood grouping test.

On the fifth assignment the court erred in holding the hearsay evidence sufficient to establish the identity of appellee *as the blood son of Lee Kut.*

On the sixth assignment, the court erred in decreeing the appellee an American citizen.

ARGUMENT AND AUTHORITIES

At the outset it must be remembered that the complaint filed herein nowhere alleges, nor does the proof show, that appellee has ever been denied any right as an American citizen. The appellee was not

present in court and not a single witness positively identified him other than by photographs taken in China and the district court never saw him.

Because he has never been denied such right the district court lacked jurisdiction of the subject matter of the action and should have either dismissed the action or abated it until the American Consul had acted.

A Certificate of Identity is a creature of the statute and may only be issued in accordance with the terms of the creating statute, and until a Certificate of Identity has been denied and an appeal from such denial has been filed with the Secretary of State in accordance with the provisions of the statute creating the Certificate of Identity as a travel document and the regulations set forth in 22 C.F.R. 50.28 the Secretary of State is without authority to authorize the Consulate General at Hong Kong to issue a Certificate of Identity to one claiming to be an American citizen.

The pleadings clearly showing, in fact the complaint alleging, that appellee *had not been denied a travel document*, deprived the district court of jurisdiction and our motion to dismiss should have been granted.

On our second assignment of error it is clear that an application to the district court for an order to show cause directed to the Secretary of State and requiring him to issue a travel document is in the nature of mandamus. District courts of the United States are not clothed with power to issue such writs.

It is our position that the district court is without jurisdiction over the person of the defendant, Secretary of State, and is without power, on a mere order to show cause why travel documents should not be issued, to order the Secretary of State to issue such a travel document. This position is fortified by the very recent decision of Judge Goodman, United States District Judge for the Northern District of California, Southern Division, in the case of *Yee Gwing Mee, Guardian Ad Litem for Yee Yook Baw, et al v. Acheson*, being cause No. 30994, in which Judge Goodman stated:

> "The main and vital issue is whether the court has power, in a proceeding under Section 903, to order the Secretary of State to issue a certificate of identity to plaintiff in such action. Plaintiff contends that the court has what he denotes as 'ancilliary' power, in a proceeding under §903, in aid of the proceeding, to issue the order requested. In effect, he urges that in any case brought pursuant to §903, plaintiff is entitled to receive a certificate of identity and hence that in every case of denial by the Secretary of

State, the court has power to issue and the petitioner should receive an order as requested. The defendant contends that neither by §903, or otherwise, is such power or jurisdiction vested in a United States District Court.

"The order sought is in the nature of mandamus. No power is vested in a United States District Court under §903 to issue the order requested. To the contrary, §903 provides that a person outside the United States, who files an action claiming citizenship, *may*, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a *diplomatic or consular officer* of the United States * * * a certificate of identity * * *. The statute further provides that the applicant may appeal to the Secretary of State from a denial by the consular officer of the certificate, and that the Secretary, if he affirms the denial, must state his reasons therefor in writing.

"The statute also authorizes the Secretary of State, with the approval of the Attorney General, to prescribe rules and regulations for the issuance of certificates of identity. Such regulations have been issued. 22 C.F.R. 50.18, 50.29. The only restriction the statute imposes upon the Secretary is that he may not deny a certificate *solely* on the ground that the applicant 'has lost a status previously had or acquired as a national of the United States.'

"We therefore look in vain, *within* the statute, for any power there vested in a United States Court to direct the issuance of a certificate. Whenever Congress has decided to authorize United States Courts to issue orders or make judgments in connection with administrative proceedings, it has specifically provided there-

for by statute.[1] To construe this statute, as argued by plaintiff, would render illusory and nugatory, the power therein vested in the Secretary of State. For it would make the statute read to the effect that a certificate of identity must, ipso facto, issue in any case where a §903 complaint is filed.

"We must look elsewhere, then, to find the power, which plaintiff is pleased to call 'anciliary'. But when we do so, we run headlong into a stone wall, to-wit, the prohibition that prevents courts from compelling performance, when refused, of a non-ministerial duty by an executive officer of the government. *Marbury v. Madison*, 5 U.S. 137, 168 (1803); *Linklator v. Perkins*, 74 F. (2d) 473, (App. D.C. 1934); *United States ex rel. Alaska Smokeless Coal Co. v. Lans*, 250 U.S. 549 (1919).

"It is true that there is authority to compel performance when refused, of a ministerial duty. Also a Federal Court can, in some instances, compel action in matters involving judgment and discretion, but then only to compel an officer to take action one way or another, but not to direct the exercise of judgment or discretion in a particular way, *Wilbur v. U.S.* 281 U.S. 206, at 218.

"The record shows that the American Consul in Hong Kong had evidence before him which

---

[1]For example, see Review of disallowance of debt claim by Alien Property Custodian, 50 U.S.C. App. §34. Review of orders of the Securities and Exchange Commission, 15 U.S.C. §771. Review of farm marketing quotas, 7 U.S.C. §1366. Review of orders of Secretary of Agriculture under Packers and Stockyards Act. 7 U.S.C. §194. Review of arbitration award under Railway Labor Act, 45 U.S.C. §159.

called for the exercise of discretionary judgment on his part as to the identity of the applicant for the certificate of identification. §903, by its very terms, confers discretionary power upon American consular officers and upon the Secretary of State in the issuance of Certificates of Identity. There is, by the statute, vested in consular officers and the Secretary of State, the power to determine whether or not the showing made by an applicant for a Certificate of Identity is 'in good faith' and 'has a substantial basis'. The plain language of §903 conclusively negates any claim that the function of the Secretary of State is ministerial.

"There is no authority in law anywhere discoverable, which vests in this court the power or jurisdiction to make a determination which, by this statute, is exclusively vested in the Secretary of State and consular officers of the United States. To grant the order prayed for would be in effect a determination by this court, irrespective of the determination of the Secretary of State, and as a judicial matter, the very subject matter committed by the statute to the decision of the executive branch of the government. This would be an unwarranted and unconstitutional exercise of power by the courts. We should be mindful always of Chief Justice Marshall's statement to the effect that courts should be equally circumspect in assuming jurisdiction where it is not vested as to refuse to exercise power where it exists. *Bank of United States v. Deveaux*, 90 U.S. 85 (1809).

"Nothing in §903 warrants the conclusion that a petitioner availing himself of this statute has a right to be present in the United States to prosecute his litigation. See *U. S. ex rel Leung v. Shaughnessy*, D.C. S.D. N.Y. 1950, 88 Fed. Supp., 91, at 93. *Kawaguchi v. Acheson*, 9 Cir.

184 F. (2d) 310 (1950), cited by petitioner, does no more than hold that a petitioner in an action under §903 shall not be compelled, over his ob-objection, to proceed to trial in such action while he is abroad.

"Petitioner has called attention to an unreported decision of Judge Driver, of the Eastern District of Washington, in *Lee Tin Loy v. Acheson*, No. 1018, on July 9, 1952, wherein Judge Driver stated his belief that the court has the power to issue an order of the kind sought here. The facts in the *Lee Tin Loy* case are not before me. But it appears from a statement in the oral opinion quoted, that Judge Driver was acting under the assumption that the act of the Secretary of State, in denying a Certificate of Identity in the cited case, was a ministerial act and hence the court had power to direct him to perform it. I must respectfully differ, inasmuch as I am of the opinion that the power conferred upon the Secretary of State under §903 is not ministerial in character.

"It is argued that the defendant, by foreclosing the right to travel documents, may defeat the very litigation directed against him. If the denial of the certificate has that effect, then the remedy is by legislation.

"There is no way of knowing before trial, whether the presence of petitioner is indeed necessary. It may well be that at trial, if the presence of petitioner proves to be necessary, the court may, pursuant to its inherent power in that regard, order the defendant to cause the production of plaintiff *as a witness*. But that is not necessary now to decide. If the power to do so does exist, it could not, of course, be exercised except upon a proper showing. Certainly no showing is made here as to any need for the pres-

ence of this child plaintiff in order to determine the litigation. Indeed, it is difficult to see how he could give any pertinent evidence as to his own birth or parentage or identity. The suspicion is not wholly unwarranted that the main object of the proceeding is to get the child into the United States irrespective of the merits of his claim of nationality.

"Being of the view that this court has no power in a proceeding under §903 to issue the order sought, the petition for such order should be and is denied.

"Dated: September 5, 1952.

LOUIS E. GOODMAN
United States District Judge."

In the very recent case of *Soon Lock Kee and Soon Moon Kow, as Guardian ad Litem for Soon Jick Kuey v. Acheson,* Civil No. 30469, Judge Carter, United States District Judge for the Northern District of California, Southern Division, made a similar holding.

THE SECRETARY OF STATE IS NOT AUTHORIZED TO ISSUE TRAVEL DOCUMENTS UNDER SECTION 903

The statute (§903, T. 8 U.S.C.) with respect to a "Certificate of Identity" expressly provides:

"* * * If such person is outside the United States and *shall have instituted such an action* in court, *he may, upon submission of a sworn application* showing that the claim of nationality presented

in such action is made in good faith and has a substantial basis, *obtain from a diplomatic or consular officer* of the United States *in the foreign country in which he is residing* a Certificate of Identity *stating that his nationality status is pending before the Court*, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. * * *"

The Section further provides for an appeal from the consul's decision to the Secretary of State.

Clearly, the statute above quoted refers to travel documents applied for *after the institution* of the action authorized to be commenced in the United States by one claiming American nationality while abroad, and *not applications filed before.*

In this case, it clearly appears that the action is premature because, in the very nature of things, there is no allegation in the complaint that *after the institution of the action any application whatever*, to the only person *authorized* to issue a travel document *has been made or refused.*

The order issued by the District Court, requiring the *Secretary of State to issue a travel document is void* because, we say without fear of successful contradiction, that there is no duty imposed upon the Secretary of State or any authority in law authoriz-

ing him to do the thing the order of the district court requires him to do. That duty, by express provisions of law, *is to be performed by the American Consul* within the foreign country where the applicant resides, and *then only after the institution of the suit* which is authorized by the statute *to enable the plaintiff to come to the United States to prosecute his action.*

The refusal of the Consul to issue the travel documents *a long time prior to the commencement of the suit* here involved, in the very nature of things cannot be considered a *refusal of the travel document which would permit the plaintiffs to come to the United States to prosecute actions that did not then exist.*

On the third assignment of error we submit that our argument on the second assignment is applicable.

On our fourth assignment of error we earnestly urge that there was absolutely no competent evidence of *identity.* True as to the birth there was evidence, but it was all hearsay, except for a photograph taken in China many years ago *no one identified the child alleged to have been born as the same individual referred to as being the person whose application for a travel document had not been acted upon* by the consulate in China, and the court did not see the in-

dividual referred to by any of the witnesses. A blood grouping test, denied by the district court, could and would, we believe, have shown whether the alleged father's blood typed with that of the alleged son. If it did not, such blood grouping test would have definitely proven fraud.

Where the claim of American citizenship is founded upon paternity rather than birth in the United States, such paternity and/or identity must be established by documentary or such other *clear* and *convincing evidence* sufficient to satisfy the court of the bona fides of appellee's claim.

Appellee's identity and paternity is controverted. A physical examination, including the taking of blood tests may have important probative value to the court in determining this issue, and we submit, that the district court abused its discretion in refusing to order such test.

Authority for such an order is found in Rule 35, Federal Rules of Civil Procedure.

Federal Judicial Code, 28 U.S.C. 723 (b) provides:

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the District Courts of the United States * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil

actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

"They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect." (June 19, 1934)

Rule 35 of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States, reads:

"*Physical and mental examinations of persons.*
(a) Order for examination.

In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and all other parties and shall specify the time, place, manner, and conditions, and scope of the examination and the person or persons by whom it is to be made."

This rule is completely in harmony with the spirit and purpose of the new procedure to bring into the light all of the available evidence on the issues without regard to any tradition superstition that any party has a proprietory right to conceal or withhold it.

Rule 35 is necessarily valid because adopted by the Supreme Court and because Congress took no affirmative action against it when, pursuant to the

requirement of the Enabling Act, the rules as a whole were submitted to Congress.

In *Siblach v. Wilson & Co.*, 312 U.S. 1 (1940) 7th Cir. the Supreme Court upheld the view that Rule 35 had been validly adopted in full conformity with the Enabling Act, *supra*, that it related to a matter properly classified and regulated as "procedure", violated no substantive right of the plaintiff in a civil action for damages for personal injuries contrary to the prohibition contained in that act, and was controlling in its field, settling the procedure to be followed by all Federal Courts, regardless of the provisions of State laws or the views of State decisions.

In *Contee v. United States* (1940) 112 F. (2d) 447 an action on a War Risk Insurance policy the court held that the granting by the Federal District Court of a petition for a physical examination of the plaintiff, under the authority of Rule 35(a) violated no substantive rights of privacy and infringed upon no constitutional right.

Rule 35 was upheld and the conclusion reached that the adoption and application of the rule is a proper exercise of the power of the court under the act.

Kelleher v. Cohoes Trucking Co. (1938) N.Y. 25 F. Supp. 965;

Wadlow v. Humberd, 1939, N.Y. 27 F. Supp. 210;

The Italia, 1939, 27 F. Supp. 785;

Strasser v. Prudential Ins. Co., 1939, 1 F.R.D. 125.

In *Leach v. Grief Bros.*, D.C. Miss. 1942, 2 F. R. D. 444, the court held that this rule superseded Mississippi law under which court is without power to compel party to submit to physical examination.

In *Beach v. Beach*, 114 F. (2d) 479, (D.C.) an action by an infant and wife for maintenance wherein the husband counterclaimed for divorce on the ground of adultery, the court approved the blood grouping test.

Judge Edgerton delivering the opinion of the court in which Judge Rutledge concurred, held that Rule 35(a) related "exclusively to the obtaining of evidence, and was therefore procedural" and as such neither infringed substantive rights nor was confined in its scope to action for damages for personal injuries and that it was properly applied in an action for maintenance by an infant and wife against her husband who counterclaimed for divorce on the ground of adultery, pending which a child was born to the plaintiff, as empowering the court to make an order requiring the plaintiff and child to submit to a blood

grouping test for the purpose of comparison of their blood with the blood of the defendant, the result of said test being considered as bearing upon a "physical condition" within the contemplation of the statute and both wife and child being regarded as "parties" whose physical conditions were in controversy, within the meaning of the rule.

The court further stated:

> "It remains to consider whether the physical condition of a party is in controversy * * * Clearly the characteristics of one's blood which are expressed in terms of red and white corpuscles or of haemoglobin are parts of one's 'physical condition'. We think that the characteristics which are expressed in terms of blood grouping are likewise part of physical condition * * *. Appellee offers his denial of paternity in support of his demand for blood tests. He thereby asserts, by necessary implication that the blood groupings of appellant and her child are or may be inconsistent with his paternity. Appellant, on the other hand, asserts appellee's paternity and thereby denies, by necessary implication, that the blood groupings are in controversy within the meaning of Rule 35(a)."

In the case at bar, no identity documentary evidence was introduced. Appellee is relying on his alleged father's self-serving statement concerning the relationship — no old letters, old photographs, evidence of remittances to the applicant, insurance policies in which the appellee is named as beneficiary,

income tax returns in which appellee is named as a dependent or any other evidence of documentary identity showing that a filial relationship has existed over a period of years and is not merely a recent invention.

Appellee has asserted a claim to American citizenship — waiting until he has reached the age of 26 years, and the burden is upon him to show by reasonable evidence that his claim is valid.

While counsel for appellee made no objection to our demand for a blood grouping test it is and always has been his position in the many Chinese cases he has handled that he opposes most vigorously such motions.

In *Mann v. Venetian Blind Co.*, 111 F. (2d) 455, affirming 21 F. Supp. 913, the court held that where there is material testimony which would establish a fact in issue, and a litigant fails to present it, though it is in his present ability to do so, and fails to offer a reasonable excuse for his failure, the presumption follows that the testimony, if presented would be against the litigant. See also *Bowles v. Lentin* 151 F. (2d) 615, cert. den.; *Lentin v. Porter*, 327 U.S. 805, rehearing denied, 328 U.S. 877, and *Raiche v. Standard Oil Co.*, 137 F. (2d) 446.

In *National Relations Board v. Ohio Calcium Co.*, 133 F. (2d) 721, the court held that where the party having the burden of proof as to a particular fact has the evidence within his control and withholds it, the presumption is that such evidence is against his interest.

In connection with the experience in these Chinese cases in California, the decision of Judge Westover of the Southern District of California, Central Division, in the case of *Mar Gong v. McGranery*, 109 F. Supp. 821, is indeed enlightening. Judge Goodman of the Northern District of California has also written an instructive opinion in the case of *Ly Shew as Guardian Ad Litem for Ly Moon v. Acheson*, 110 F. Supp. 50.

It follows, therefore that the district court in this case, erred in entering the decree declaring appellee to be an American citizen and its decree should be reversed.

CONCLUSION

As so truly said by Judge Goodman in his opinion:

> "As to the paternity of plaintiffs, the government did not and obviously could not present any

evidence. For the area within Communist China, wherein plaintiffs claim to have been born and wherein the alleged mother is said to be, and wherein plaintiffs claim to have lived their entire lives, has long been closed to any opportunity for investigation or verification. Thus the only recourse of the defense was to cross-examine the witnesses.

Judge Goodman, a veteran jurist of wide experience in these Chinese citizenship cases has attempted to establish an adequate legal yardstick with which to measure the evidence. He has given an elaborate background from his many years of experience, dealt with the legislative history of the Act, holding that evidence must be clear.

In *Wong Ying Loon v. Carr* (9 Cir.) 108 F. (2d) 91, this court has definitely held the burden to be on the applicant to prove his American nationality.

In his opinion Judge Goodman said:

"Plaintiffs claim that they have made a prima facie case, *that the burden of going forward consequently shifted to the defense*, that since the defense presented no evidence, it failed to carry its burden, ergo, judgment should go for plaintiffs." *(This is precisely* what Judge Lindberg in effect held.) (Italics ours)

Said Judge Goodman:

"Such reasoning begs the question as to what constitutes a prima facie case in this sort of pro-

ceeding whether or not the showing made is prima facie depends upon the nature and extent of the burden of proof.

"The burden of proof resting upon plaintiffs is to show that *they are the persons who, because of their identity, are entitled to be judicially declared to be American citizens.*

"This brings us to a consideration of what degree of proof is necessary in order to establish their identity.

"Constitutionally, only those born or naturalized in the United States and subject to the jurisdiction thereof, are citizens. Const. Amdt XIV. The power to fix and determine the rules of naturalization is vested in the Congress. Const. Art. I, Sec. 8 Cl. 4.

"Since all persons born outside of the United States, are foreigners. *Boyd v. Nebraska ex rel Thayer,* 143 U.S. 135; *U. S. v. Harbanuk,* 1, Cir. 62 F. (2d) 759, 761 and not subject to the United States statutes, such as Section 1993 and 8 U.S.C. 601 derive their validity from naturalization power of the Congress, *Elk v. Wilkins,* 112 U.S. 94, 101; *Wong Kim Ark v. U. S.* 169 U.S. 649, 702 (1898). Persons in whom citizenship is vested by such statutes are naturalized citizens and not native born citizens. *Zimmer v. Acheson,* 191 F. (2d) 209, 211 (10 Cir. 1951), *Wong Kim Ark v. U. S. Supra.* While under Section 903, the courts are not granted the jurisdiction to 'admit' to citizenship, as under the naturalization statutes, the jurisdiction to 'declare' citizenship by naturalization pursuant to Section 903 is substantially equivalent. This is so because under Section 903 a decree favorable to petitioner in effect — makes petitioner a citizen, whereas an unfavorable decree requires deportation to the foreign land of birth.

"Consequently, in my opinion, a decree *declaring* citizenship by naturalization is in all respects the same as a decree *admitting* to citizenship. Indeed, the consequences of denying the prayer of petitioners here are much more dire than those resulting from denying petitioners for naturalization, for in the latter case the petitioners may remain, in most cases, in the United States, while in the former, the result is deportation. *The degree of proof therefore, required of plaintiffs, should be of substantive parity with that required of petitioners for naturalization.* (Italics ours)

"It has been the rule in naturalization cases that an applicant for citizenship has the burden of convincing the court by satisfactory evidence that he is entitled to citizenship *U. S. v. Schwimmer*, 279 U.S. 644, 649 (1929); *Tutun v. U. S.* 270 U.S. 568, 578 (1926); *U. S. v. McIntosh*, 283 U.S. 605 (1931); In re Laws, 59 F. Supp. 179. *And the burden never shifts to the government. U. S. v. Schwimmer*, supra; *Tutun v. U. S.* supra; *U. S. v. McIntosh*, supra."

The evidence in this case certainly does not meet the standard set out in Judge Goodman's opinion, which shows a scholarly, careful study and a painstaking dissertation.

Here we have nothing but hearsay evidence of the most unreliable variety.

Judge Goodman further said:

"A judgment declaratory of the American citizenship of a person who has grown up in an

alien culture and whose only claim to citizenship is based on heredity vitally affects the American people. All the rights and privileges of citizenship would be thereby vested in a person totally unprepared to exercise them. Both the temptation and the opportunity for fraud is great in these cases. American citizenship is indeed a prize for those persons seeking to escape the misery of communist China. A plausible claim is easily presented and virtually impossible for the government to meet. The standard of clear and convincing proof, I hold, should be applied in all cases where an applicant *invokes the judicial power* to affirm a claimed right of United States citizenship by naturalization. It should be applied in these Section 903 cases."

Here, we have a man 26 years of age, who has always lived and still lives in China, wholly unprepared to take up the duties of citizenship, who may or may not be the son of Lee Kut,where a blood grouping test may or may not prove his identity as the son of this alleged father, yet the alleged father is unwilling to submit to that test, which it would seem under all of the circumstances in the interest of justice the district court should have ordered.

In the American Medical Journal of June 14, 1952, at page 699 will be found the following instructive table on blood grouping:

"*Blood groups in parents and children with ten possible matings.*

Blood Groups of Parents	Possible Blood Groups in Children	Blood Groups Not Possible in Children
OXO	O	A, B, AB
OXA	O, A	B, AB
AXA	O, A	B, AB
OXB	O, B	A, AB
BXB	O, B	A, AB
AXB	O,A,B,AB	NONE
O X AB	A, B	O, AB
A X AB	A, B, AB	O
B X AB	A, B, AB	O
AB X AB	A, B, AB	O

It hardly seems reasonable that a legitimate father would refuse to consent to a blood grouping test with that of his son unless he were fearful that the test might disprove his claim.

It is respectfully submitted that the court erred in denying our motion to dismiss on the jurisdictional ground; erred in ordering the Secretary of State to issue a travel document before the Consul had completed his investigation; erred in refusing a stay of that order; erred in finding the evidence sufficient to establish American citizenship and in entering its decree declaring appellee an American citizen and its decree should be reversed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

APPENDIX "A"

No. 30159

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNA, SOUTHERN DIVISION

LY SHEW, as guardian ad litem of LY MOON, a minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Secretary of State of the United States,

Defendant.

ORDER GRANTING MOTION FOR PHYSICAL EXAMINATION

The defendant having moved, pursuant to Rule 35 of the Federal Rules of Civil Procedure, for an order directing the plaintiff herein and his alleged father to sumbit to a physical examination, including blood grouping tests, and it appearing to the Court that such tests, if made under proper conditions by persons competent to make and evaluate such tests, may have probative value to disprove, but not to prove paternity and thus may be admissible on a trial on the merits if the trial court should find that the question of paternity is legally in issue, and it further appearing to the Court that such blood grouping tests

may properly be ordered under said Rule 35 (see *Beach v. Beach)*, it is by the court

ORDERED that the defendant's said motion for an order directing the plaintiff herein and his alleged father to submit to a physical examination, including blood grouping tests, be and the same hereby is GRANTED and defendant is directed to prepare an order in conformance with the provisions of said Rule 35.

Date: August 27, 1952.

MICHAEL J. ROCHE
Chief United States District Judge

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable William J. Lindberg, *Judge*

Appellee's Brief

EDWARDS E. MERGES
Attorney for Appellee

Office and Post Office Address:
1511 Smith Tower
Seattle 4, Washington

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable William J. Lindberg, *Judge*

Appellee's Brief

EDWARDS E. MERGES
Attorney for Appellee

Office and Post Office Address:
1511 Smith Tower
Seattle 4, Washington

INDEX

CASES CITED

STATUTES

TEXTS

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable William J. Lindberg, *Judge*

Appellee's Brief

JURISDICTION

The appellant's brief does not contain a jurisdictional statement in accordance with Rule 20(b) in that no statement of the pleadings necessary to show jurisdiction of the United States Court of Appeals appears

under the heading "Jurisdiction," and no page reference to pages of the record is made. Accordingly, appellee hereby moves to dismiss the appeal, or in the alternative, to strike the appellant's brief.

COUNTER STATEMENT OF THE CASE

Without waiving his motion to dismiss, the appellee submits herewith the following counter statement of the case:

On February 19, 1952, the appellee, through his father and next friend, filed a complaint under Section 503 of the Nationality Act of 1940, Sec. 903, Title 8 U.S.C. The complaint sought a judgment declaring the appellee to be a citizen of the United States by reason of his being the foreign-born son of a United States citizen under Section 1993 R.S. as amended. (R. 3-7.) The appellant filed no answer but during the hearing it was stipulated that he might be deemed to have interposed a general denial. (R. 23.)

A hearing was had before the United States District Court for the Western District of Washington, Northern Division on October 22, 1952. The District Court made Findings of Fact, Conclusions of Law and a Decree and Adjudication of Citizenship. (R. 22-27.) The substance of the Findings and Conclusions are as follows: That the appellee was not in court because of the appellant's failure to issue him a travel document to

permit him to travel from Hong Kong, China, to attend the hearing in the United States upon the issue of his citizenship. That the appellee's father was and is a United States citizen and filed an identification affidavit with the appellant's representative, viz., the American Consul at Hong Kong. The identification affidavit and request for travel documents were filed in *February of 1951, or approximately one year before the commencement of the above action.* The American Consul in Hong Kong has never issued a passport or travel document to enable the appellee to come to the United States and for this reason the appellee could not appear personally in court. The Decree and Adjudication of Citizenship held that the appellee is a United States citizen by reason of being the foreign-born son of a United States citizen. (R. 26.) The Decree and Findings were based upon the testimony given in court by the appellee's father (R. 41-55), the appellee's paternal grandmother (R. 56-66), the appellee's paternal uncle (R. 67-74), the appellee's cousin (R. 74-80), a family friend who had known the appellee in China (R. 80-82), and the wife of appellee's uncle, his aunt by marriage (R. 83).

At the conclusion of appellee's case, *the appellant offered no controverting evidence.* The following occurred: (R. 86-89.)

MR. MERGES: That is our case, if your Honor please.

THE COURT: *You have no proof.*

MR. BELCHER: *No, your Honor.*
I think the evidence is wholly insufficient to grant the relief prayed for.

It is based entirely upon hearsay. No direct evidence at all of the birth of this child and, further than that, it seems strange that no effort was made to bring this alleged child to the United States until he reached the age of twenty-seven years, although there was plenty of opportunity to do so.

THE COURT: I might ask you this, Mr. Belcher: What testimony do you think there would be to establish birth?

MR. BELCHER: I think, if your Honor please, that this is one case in which the blood grouping test would be proof positive, and before this case is determined by your Honor, if in the event of our denial of the motion to dismiss because of the lack of sufficient evidence, that the Court in this case should order a blood grouping test, particularly in view of the fact that one of the witnesses testified here it is the Chinese custom to adopt and take in children.

THE COURT: It is the custom in this country to do that, too.

MR. BELCHER: I realize that. I say, there is no direct evidence here at all that this man is the father of this child. It is all hearsay, every bit of it.

THE COURT: Isn't that true of most people except where you have birth certificates?

MR. BELCHER: Pardon?

THE COURT: Isn't that true in most cases except where you have birth certificates?

MR. BELCHER: No. I think, as your Honor knows, in some of these Chinese cases they have introduced birth certificates.

THE COURT: What if they haven't any?

MR. BELCHER: The burden is upon them; not us.

THE COURT: The Court thinks it is proved and grants the Petition.

MR. BELCHER: I didn't hear.

THE COURT: The Court thinks the proof is sufficient.

MR. BELCHER: And the Court refuses to order——

THE COURT: (Interposing) I see no occasion to order it unless you have some other showing than guess work. I don't think it is sufficient to say lack of a birth certificate is proof of your position. There is nothing else you have offered at all.

MR. BELCHER: Well, there is no showing here, if your Honor please, and there has been no positive proof here, of citizenship, and the burden is entirely upon the Petitioner.

THE COURT: I grant that, but the statute provides for this action. What kind of proof is the Court supposed to have? The Court realizes that there can be situations where a person is an imposter and not a true son, but at the same time is the Court to listen to witnesses and assume that they are not telling the truth?

Maybe the Court is under some misapprehension and maybe the statute should be changed, but when an action like this is filed and these people get on the stand and they are citizens and they take the oath and the presumption is that they understand then they testify, granted it is hearsay, but there are many, many people, most of the people in the world, whose birth must be proved by hearsay, and that type of hearsay testimony is acceptable.

MR. BELCHER: The father and mother are the only two people that could testify to that.

THE COURT: *The father can't testify if he isn't there and the mother is dead.*

The fact that the mother died—the Court doesn't wish to get into a debate, but it appears to the Court that if the mother is dead—*and there is no other person who can testify of personal knowledge, whether it be a doctor or midwife, whoever it may be, you say that that isn't sufficient showing;* or, on the part of the Government in a case of this character, merely to show that there is no one else who can say that they know that the son——

MR. BELCHER: Well, I would like to have the record show that I ask the Court, under Rule 35, for a blood test, a blood grouping test, which would be proof positive of the lack of parentage, and that is our defense here—that there is no

identification. This would be a very good case to have the Court of Appeals determine.

THE COURT: *I think it may be. I think in regard to your last motion the record may so show. I think it is not timely and the Court will say that the testimony is not such as to warrant the Court on its own motion, to ask for that test.*

Frankly, I will say this: These cases are a problem to the Court. Recognizing that situations may present themselves where persons other than sons of citizens will contend to be such, unless the Government has something more to establish that, I don't think the Court is in a position to presume that these witnesses are not telling the truth.

ARGUMENT IN SUPPORT OF JUDGMENT

The appellee brought suit under Section 503 of the Nationality Act of 1940 as he had a legal right to do. Such suits are not without precedent and when proper and sufficient evidence is introduced in support of the allegations of the petition, the District Court is empowered by the very terms of the statute itself to make a Decree and Adjudication of Citizenship. The statute states:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency or executive official thereof upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against

> the head of such department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the District in which such person claims a permanent residence, *for a judgment declaring him to be a national of the United States*——" (Italics ours).

In the following cases, among others, Federal Courts have considered similar actions brought under Section 503 of the Nationality Act of 1940. *Acheson v. Yee King Gee,* 184 F.2d 382; *Kiyoshi Kawaguchi v. Acheson,* 184 F.2d 310; *Wong Wing Foo v. McGrath,* 196 F.2d 120; *Acheson v. Nobuo Ishimaru,* 185 F.2d 547; *Podea v. Acheson,* 2 Cir., 179, F.2d 306; *Attorney General v. Richetts,* 165 F.2d 193; *Bauer v. Clark,* 7 Cir., 161 F.2d 397; *Brassert v. Biddle,* 2 Cir. 148 F.2d 134; *Look Yung Lin v. Acheson,* 187 F. Supp. 463.

In the instant case all of the witnesses testified affirmatively that the appellee is the person whom he claims to be, the blood son of Lee Kut, an American citizen. It is, of course, conceded that if the appellee is the son of Lee Kut, he is an American citizen and is entitled to enter and remain in this country. Examination of the testimony of the witnesses reveals that all of them were in a position to know the relationship in question and all testified positively and affirmatively. In addition to the testimony, there was introduced appellee's Exhibit No. 1, a copy of the appellee's

father's Certificate of Identity (R. 40), Exhibit No. 2, a letter from the District Director of Immigration regarding the appellee's father's citizenship status (R. 41), Exhibit No. 3, a picture of the appellee which was identified as being the appellee, son of Lee Kut (R. 43), Exhibit No. 4, *a group picture taken several years ago* of the appellee's cousin and the appellee. The picture was taken in 1940 and the cousin was one of the witnesses who testified at the time of the trial (R. 50, 74 and 75). Exhibit No. 5, the war service record of appellee's father (R. 51).

The appellant offered *no evidence* as we have already pointed out. The government's principal contention made at the time of the trial seemed to be that the appellee's petition should be dismissed by reason of the fact that the testimony given by the various witnesses was "hearsay." Regarding such testimony, this Court in the case of *United States v. Wong Gong,* 70 F.2d 107, said:

> "The testimony of the witness as to the date and place of his birth, is of course, hearsay, *but it is competent.* Wigmore on Evidence, Sec. 1501; *United States v. Tod* (C.C.A.) 296 F. 345. In the case at bar appellee testified before the District Court in the trial *de novo* and the testimony given by appellee before the Commissioner and before the Immigration Inspector as to where he had

> lived since his birth, was also introduced. The District Judge accepted this testimony, which, if believed, is sufficient to sustain the order. We cannot say that the testimony of appellee is insufficient and the order must be affirmed." (Italics ours.)

In the circumstances presented in the instant case, the Court made a Decree in accordance with specific powers given it by the statute. The Decree was adequately supported by the evidence and such evidence has been held to be competent evidence in the Wong Gong case, *supra.* Accordingly, the Decree entered herein should stand.

ANSWER TO APPELLANT'S ARGUMENT

Appellant's First Assignment of Error

The appellant first assigns as error (Br. p. 26) the District Court's refusal to dismiss plaintiff's complaint for lack of jurisdiction. Appellant's argument is, in substance, that "the American Consul at Hong Kong had not completed his investigation and appellee had therefore not been denied any right as an American citizen."

In the first place it will be noted that the District Court said (R 40) "Well the record may show that there was no motion to dismiss filed."

If the rule were, as contended by the appellant, it is obvious that an individual in the status of the appellee would be entirely at the mercy of the very person against whom he seeks relief since the appellant could defeat the appellee's right by simply refusing to act in one way or the other. In the instant case, the appellant refused for a period of a year to furnish the appellee with a travel document and has never indicated when, if ever, he intended either to give the appellee a travel document or refuse to do so. Certainly the failure of the appellant to act is, in the circumstances presented in this case, tantamount to a refusal. If not, how long should a person in the place of appellee be required to wait? The Court found in October of 1952 that although the appellee's father had filed an identification affidavit with the Consul in Hong Kong in February of 1951 (R. 24), the Consul had failed to grant the travel document. In other words, the Consul sat on the matter and refused to act for a period of approximately twenty months. We ask appellant how much time should he have to act?

With regard to the law on the subject, we respectfully invite the Court's attention again to Section 503 (Title 8, Sec. 903) which provides in part as follows:

> "If a person who claims a right or privilege as a national of the United States is denied such right or privilege by any department *or agency or executive officer thereof* * * *" (Italics ours.)

We see from the very terms of the statute itself that a denial by an agent or executive officer of a department head also gives a person, such as appellee, cause of action under the statute. The statute does not require an appeal or final action by the department head himself as can be seen by the very terms of the statute itself where it says, *"or agency or executive officer thereof."*

In addition to the terms of the statute, this Court in the Wong Wing Foo case, *supra,* said, among other things at page 122:

> "Nothing in the above text suggests that the 'action * * * for a judgment declaring him to be a national' *is to succeed some prior administrative proceeding. This section is largely invoked where there has been no administrative proceeding at all.* Such is the case where the Department of State refuses to give a passport, *Perkins v. Elg,* 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320; *Podea v. Acheson,* 2 Cir., 179 F.2d 306; or where a consul refuses to register a person as a United States national, *Acheson v. Mariko Kuniyuki,* 9 Cir., 189 F.2d 741; or refuses to allow a person claiming American citizenship to come to this country, *Acheson v. Yee King Gee,* 9 Cir., 184 F.2d 382; or where American citizens acting under claimed duress have been filed with the Attorney General notices of their renunciation of citizenship and then later seek to have them set aside, *McGrath v. Tadayasu Abo,* 9 Cir. 186 F.2d 766. In none of the above cases is the Section 903 action a trial *de novo. There has not been anything*

> *tried by the Department of State or of Justice to be tried again as on appeal or review.*" (Italics ours.)

In the case of *Hichino Uyeno v. Acheson,* 96 F. Supp. 510, this District Court, speaking through Judge Yankwich, said:

> "It is a fundamental rule of equity jurisprudence that he who prevents the exercise of a right by another cannot insist that the right was lost during the period in which its exercise was prevented by him or by order of Court."

Certainly this "fundamental rule of equity" applies where the appellant refuses to act upon the application by simply doing nothing. Can he urge this failure to act, his own failure to act, as being a reason to deprive the appellee of rights given him under the statute? We think not. This principle was recognized also in the case of *Kiyoshi Kawaguchi v. Acheson,* 184 F.2d 310, when the Court said: "When such an application is made in good faith and the claim of citizenship has a substantial basis such a certificate must issue to enable the applicant to travel to the United States for the limited purpose of attending and testifying at the trial of his pending action."

This being the law it is difficult to see how the appellant can be heard to complain of the District Court's decision because the appellee's application (R. 7), alleged *"good faith"* and a "substantial basis" and

yet the appellant refused and still refuses to issue appellee a travel document or anything at all "to enable the applicant to travel to the United States" for the purpose of attending and testifying or for any purpose at all. Also on this point and on the point raised by appellant that appellee should not be heard because he is not even in the United States, see *Acheson v. Yee King Gee,* 184 F.2d 382, where this Court said:

> "The first point has to do really with venue rather than jurisdiction. The contention is that in the circumstances of the case the only court in which action might be brought was the District Court for the District of Columbia, where the Secretary resides. However, Section 503 of the Act provides that the action may be brought either there or in the district in which the *person asserting nationality 'claims a permanent residence.'* The complaint alleged that appellee claims his permanent residence as Seattle, Washington, where his father resides. *The allegation sufficed to invoke the jurisdiction of the court below; and the court found as a fact that the claim of Seattle residence was made in good faith and upon substantial basis.* It is to be noted that the statute permits the bringing of the suit regardless of *whether the plaintiff is within the United States or abroad.* In the circumstances in evidence the minor's claim to permanent residence where his father lived was neither irrational nor unfounded." (Italics ours.)

Sec. R. 4 where appellee has made similar claim of residence.

Appellant's Second and Third Assignments of Error

Appellant's Second and Third Assignments of Error involve the same point and will therefore be discussed together. The substance of appellant's point is that the District Court erred in directing the appellant to issue a travel order to permit appellee to travel to the United States for the purpose of attending the hearing upon the question of his citizenship.

In the first place, we do not perceive how the Court's ruling on this point has affected the ultimate ruling in the case at bar and how, therefore, it can logically be assigned as error. In the case at bar the District Court held that the appellee is a citizen of the United States. Whether the District Court directed the appellant to issue a travel document does not affect the ultimate ruling one way or the other. Furthermore, the appellant refused to issue the travel document so it is difficult to see how he was harmed in any way by the order complained of. *Issuance of such an order is not without precedent and has been held by the Court to be a non-appealable order and "a step toward final disposition of the merits of the case."* See *Acheson v. Nobuo Ishimaru,* 185 F.2d 547, where, in a *per curiam* opinion this Court said:

> "We are of opinion that the order below is not appealable. It appears not to fall 'in that small class which finally determine claims of rights separable from, and colateral to, rights asserted in

> the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528. *By this order the District Court but took a step toward final disposition of the merits of the case.* The order is more nearly analogous to that held purely interlocutory in *Cobbledick v. United States,* 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783, involving an attempted appeal from the denial of a motion to quash a subpoena *duces tecum.*" (Italics ours.)

See also *Kiyoshi Kawaguchi v. Acheson, supra.*

Appellant's Fourth Assignment of Error

In the appellant's Fourth Assignment of Error he urges two things. (1) That "there was absolutely no competent evidence of identity." In this regard we have already pointed out that such evidence as was given in this case has already been held to be competent. See *United States v. Wong Gong, supra.* (2) That the Court should have ordered a blood test, and cites as authority Rule 35, Federal Rules of Civil Procedure, together with *Beach v. Beach,* 114 F.2d 479 and *Siblach v. Wilson & Co.,* 312 U.S. 1.

There are numerous answers to appellant's contention, the first of which is that the appellant made no motion for a blood test until the trial was ended. The Court said, "I think it is not timely and the Court will say that the testimony is not such as to warrant

the Court, an its own motion, to ask for that test." (R. 89.) In addition to the fact that the motion was not timely, the test would prove nothing since even conceding that such tests are entirely reliable, they are valueless without the blood groupings of *both parents* as shown by the table set out by appellant himself on page 48 of his brief. The record in this case shows, and the Court found, that the appellee's mother is dead (R. 88), and that since she is therefore unavailable for a blood test, we would like to know what the appellant would seriously contend in regard to the value of a test of the father's blood alone, since according to appellant's own tables such a test would be valueless.

Thirdly, we think, although the question is not directly presented in this case by reason of the untimely motion and the death of the mother, that Rule 35 does not give the Court power to order a blood test in *such a case as this.* Rule 35, by its own terms, restricts the Court's power to "the mental or physical condition of *a party.*" The appellee's father is certainly not a real party to this controversy and the appellant has cited no authority giving the Court jurisdiction over him. The case of *Beach v. Beach, supra,* is a divorce case where an actual party to the controversy was involved and the case of *Siblach v. Wilson & Co., supra,*

involved facts entirely different from those presented in the case at bar.

Appellant's Fifth and Sixth Assignments of Error

The appellant seems to have directed no specific argument to Assignments of Error Five and Six, and in answer to the bare assignments, we respectfully invite the Court's attention to our "ARGUMENT IN SUPPORT OF JUDGMENT" previously made.

SUMMARY AND CONCLUSION

The judgment of the District Court and the Findings of Fact made in connection therewith are adequately supported by the evidence and the law. Appellant has failed to show that the Court committed any error in the course of the trial and accordingly the judgment entered herein should be affirmed.

Respectfully submitted,

EDWARDS E. MERGES
Attorney for Appellee

No 13695

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend, LEE KUT,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 5/19/53 — 45 COPIES

No 13695

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend, LEE KUT,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 5/19/53 — 45 COPIES

INDEX

CASES CITED

STATUTES

No 13695

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend, LEE KUT,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANT

JURISDICTION

Counsel has moved to dismiss the appeal or in the alternative to strike appellant's brief because we failed to cite the statute conferring jurisdiction on this court and erroneously states no page reference

of the record is made. This latter statement, is of course incorrect and misleading.

It was an inadvertance that we neglected in our jurisdictional statement to cite Title 28 Section 1291 as conferring jurisdiction on this court, which hardly calls for the penalty exacted by counsel.

ARGUMENT IN REPLY TO APPELLEE

To begin with, the jurisdiction of the district court is predicated on a person being *"denied * * * a right or privilege * * *."*

Here, there is neither pleading nor proof of such. But counsel claims and argues, without citation of supporting authority, that *delay* on the part of the American Consul in processing appellee's application for a passport is tantamount to a denial. This position is untenable for several reasons, chief among which is the fact that the consul had not completed his investigation of appellee's application for a *passport* when this action was started in February 1952, and the further fact that in paragraph VIII of the complaint (R. 6-7) it is by appellee alleged, inter alia, "On October 11, 1951 (the Consul) wrote a letter, stating that the plaintiff had been interviewed at the office of the American Consul but *had not pre-*

sented sufficient evidence to enable the Consul to issue him a final document and that it was indefinite when any travel document would be issued because there were approximately 1800 cases ahead of plaintiff * * *." (R. 6)

In this same paragraph, appellee attempts to substitute his interested conclusion as to the sufficiency of the evidence before the Consul for that of the Consul, whose duty it is to make the determination, by stating "but there is in truth and in fact no good reason for such delay because the plaintiff has submitted adequate and competent evidence of his citizenship and right to come to the United States * * *." This, of course, is for the determination of the Consul and not the applicant.

The pleadings do not attempt in any manner to set forth what this so-called adequate and competent evidence was, unless it can be gathered from the further allegations in paragraph VIII, wherein it is alleged that appellee's right to a travel document could be determined on a basis of affidavits submitted. (R. 6)

This argumentative allegation further states that appellee "is subject to examination by the United States Immigration authorities at a port of entry in the United States" and for that reason he should

have been given a passport without further ado.

The difficulty with this is that it is a matter for the exclusive determination of the Consul in the foreign country, and not for the courts under existing law, and the remedy, if any is needed, must be sought through Congressional enactment.

A passport is issued only to American citizens, and until an applicant in a foreign country for a passport to come to the United States is able to satisfy the Consul that he is in fact an American citizen the passport will not issue.

By Section 903, Title 8, U.S. Code, *until such applicant is denied a passport*, he is not authorized to invoke the jurisdiction of the United States District Court. The statute in this respect certainly is not ambiguous, it reads:

> "If any person who claims a right or privilege as a national of the United States *is denied such right or privilege* * * * (he) may institute an action against the head of such department in the United States Court for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

From this, it will be seen that *there must be a denial* of passport before suit is instituted, or the District Court is authorized to entertain such a suit.

The complaint *negatives a denial,* but counsel argues that long delay is tantamount to a denial.

Without some valid excuse for a long continued delay in processing the application for a passport there may possibly be instances where such delay might be treated as a denial, but here, appellee himself, through his father Lee Kut as his next friend, furnishes at least two of the reasons for the delay in this case by the allegations contained in paragraph VIII of his complaint wherein it is stated that the consul had advised him that appellee had appeared before him, "*but had not presented sufficient evidence*" and "*there were approximately 1800 cases ahead of plaintiff.*" (R. 6)

The Consul naturally considers these applications in the order of filing and in the very nature of things it takes much time to examine as many as 1800 applications, so, that in due course there will be a conclusion reached by the Consul in the consideration of appellee's application, but it is a condition precedent to suit that a passport first be denied.

By commencing a suit in the District Court appellee is attempting to by-pass the 1800 applicants ahead of him and have a judicial determination made of his case without awaiting the administrative decision on his application.

His whole complaint is that of inaction upon the part of the American Consul at Hong Kong.

Appellee in his brief, asserts on the authority of *Bauer v. Acheson*, 161 F. (2d) 397, that such inaction is a denial of the right or privilege guaranteed by the Constitution.

> Persons outside the United States have no constitutional right to test claims to United States citizenship in the courts.

It has long been recognized that even when the Constitution requires due process of law, it does not necessarily contemplate a judicial hearing. This concept has been dramatically proclaimed in a host of decisions under the Immigration laws, which have confirmed the authority of Congress to confide determinations in exclusion and deportation cases to Immigration officers, empowered to act without judicial intervention.

The Chinese Exclusion Case, 130 U. S. 581 (1898);

Ekiu v. United States, 142 U.S. 651 (1892);

Fong Yue Ting v. United States, 149 U.S. 698 (1893);

Lem Moon Sing v. United States, 158 U.S. 538 (1895);

The Japanese Immigrant Case, 189 U.S. 86 (1903).

It is true that a claimant to United States citizenship who is within the United States may invoke judicial aid in contesting an order designating him to be an alien.

Ng Fung Ho v. White, 259 U.S. 276 (1922).

There is no constitutional requirement which offers access to a judicial forum to a person residing abroad who claims to be a citizen of the United States. Federal law does not preclude the maintenance of a suit in the courts of the United States by a non-resident, if such litigation is otherwise permitted. However, it is doubtful whether such non-resident can demand full procedural benefits under the Constitution of the United States. Cf. *Johnson v. Eisentrager*, 339 U.S. 767 (1950). The courts always have held that a claimant to United States citizenship who seeks to enter this country can not assert any constitutional right to a judicial hearing when Congress has declared that his rights and status must be evaluated by administrative officers. The leading case is *United States v. Ju Toy*, 198 U.S. 253 (1905) which ruled that immigration officers had acted within the scope of their authority in barring from the United States a person whose title to United States citizenship they had found insubstantial. The court held that Congress can entrust the determination of such

citizenship status to an executive officer, without any opportunity for de novo examination in the courts. Justice Holmes, speaking for the court, stated, 198 U.S. at 263:

> "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, and in *Fong Yue Ting v. United States*, 149 U.S. 698, 713, before the the authorities to which we already have referred. It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case."

In *Tang Tun v. Edsell*, 223 U.S. 673 (1912) Justice Holmes similarly observed:

> "The acts . . . make the decision of the appropriate immigration officer final unless reversed on appeal to the Secretary of Commerce and Labor. And if it does not affirmatively appear that the executive officers have acted in some un-

> lawful or improper way and abused their discretion, their finding upon the question of citizenship may be deemed to be conclusive and is not subject to review by the court."

And in *Ng Fung Ho v. White*, 259 U.S. 276, 282 (1922), which supported the right to a judicial hearing for a citizenship claimant *within* the United States, Justice Brandies commented:

> "If at the time of arrest they had been in legal contemplation without the borders of the United States, seeking entry, *the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing.*" (Italics ours)

See also *United States v. Sing Tuck*, 194 U.S. 161 (1904); *Chin Yow v. United States*, 208 U.S. 8 (1908); *Medeiros v. Watkins*, 160 F. (2d) 897 (C.A. 2, 1948). In the latter case all the authorities on this point are collated.

> Congress may define, modify, or withhold the right to bring suit and determine under what circumstances suit shall be instituted.

The laws of the United States recognize no inherent right to maintain any form of civil action in the federal courts. The Constitution directs that the judicial power shall be lodged in the Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish," Art. III, section 1. The only apparent exception precludes suspension

of the right of habeas corpus, except in cases of rebellion and invasion, Art. III, sec. 9. While the Constitution specifies that the judicial power shall extend to cases and controversies (Art. III, section 2), the mode in which such controversies can be heard and the form of relief, if any, are matters to be determined solely by Congress. Congress can grant or withhold a remedy and can withdraw such remedy after it has been established. Such determination regarding the jurisdiction of the federal courts (other than the Supreme Court) are peculiarly within the competence of Congress.

These doctrines are elucidated by a long line of adjudications originating in the early days of the Republic. The court is referred to only two decisions of the United States Supreme Court in which the controlling principles are summarized and many of the cases are collected. Thus, in *Kline v. Burke*, 260 U.S. 226, 233-4 (1922), the court stated:

> "The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be

> not extended beyond the boundaries fixed by the Constitution * * *. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it * * * And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a savings clause all pending cases though cognizable when commenced must fall * * * A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right."

And in *Hallowell v. Commons*, 239 U.S. 506 (1916), the Supreme Court upheld a statute taking from the federal courts jurisdiction to hear certain cases affecting Indians and conferring upon the Secretary of Interior exclusive and final authority to adjudicate such claims. The Court's opinion, delivered by Justice Holmes, observed, 239 U.S. at 508-9:

> "It is unnecessary to consider whether there was jurisdiction when the suit was begun. By the act of June 25, 1910, c. 431, 36 Stat. 855, it was provided that in a case like this of the death of the allottee intestate during the trust period the Secretary of the Interior should ascertain the legal heirs of the decedent and his decision should be final and conclusive; with considerable discretion as to details. This act restored to the Secretary the power that had been taken from him by acts of 1894 and February 5, 1901, c. 217, 31 Stat. 760. *McKay v. Kalyton*, 204 U.S. 458, 468. It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but pur-

ported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. The appellee contends for a different construction on the strength of Rev. Stats. § 13, that the repeal of any statute shall not extinguish any liability incurred under it, *Hertz v. Woodman*, 218 U.S. 205, 216, and refers to the decisions upon the statutes concerning suits upon certain bonds given to the United States. *United States Fidelity and Guaranty Co. v. United States*, 209 U.S. 306. But apart from a question that we have passed, whether the plaintiff even attempted to rely upon the statutes giving jurisdiction to the courts in allotment cases, the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right but simply changes the tribunal that is to hear the case. In doing so it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of Indian affairs. The consideration applies with the same force to all cases and was embodied in a statute that no doubt was intended to apply to all, so far as construction is concerned.

"There is equally little doubt as to the power of Congress to pass the act so construed. We presume that no one would question it if the suit had not been begun. It is a strong proposition that bringing this bill intensified, strengthened or enlarged the plaintiff's rights * * * The difficulty in applying such a proposition to the control of Congress over the jurisdiction of courts of its own creation is especially obvious."

These principles obviously govern suits for declaratory judgment. Prior to 1934 it was uniformly

held that the federal courts were powerless to entertain actions seeking declaratory judgments.

Piedmont v. United States, 280 U.S. 469 (1930). The federal courts were clothed with jurisdiction to render declaratory decrees for the first time by the Declaratory Judgment Act of June 14, 1934, 48 Stat. 955. In section 503 of the Nationality Act of 1940 Congress did sanction independent judicial inquiry when an asserted right to United States citizenship was denied on the ground that such person was not a national of the United States but the very novelty of this remedy originating in 1940 would hardly support any assumption of an inherent right to judicial examination. The entire course of adjudication by the Supreme Court certainly rejects such an assumption and compels the conclusion that an unsuccessful citizenship claimant who is outside the United States is entitled only to such redress as Congress may afford him. Congress has, in fact, now withdrawn the remedy under the 1940 Act to persons so circumstanced as appellee and has provided under section 360 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1503) that declaratory judgment actions are not available to citizenship claimants who are outside the United States but they must pursue their administrative remedy by applying for a certificate of identity for travel to the United States

whereupon a ruling on such person's citizenship status will be made by immigration officers in the United States whose determination may be reviewed in habeas corpus proceedings.

> Denial of "a right or privilege on the ground that 'he is not a national'" is a prerequisite to jurisdiction of the District Court.

Since the court has no jurisdiction except as prescribed by Congress and Congress in section 503 of the Nationality Act of 1940 (8 U.S.C. 903) unmistakably provided that only those who are denied a claimed right or privilege upon the ground that they are not a national of the United States may institute an action. The failure of the complaint to clearly specify and allege such jurisdictional prerequisite is fatal. This is so even where it appears by allegation in the complaint that no action has been taken after repeated requests for travel documents. Two District Courts in this Circuit have so held.

> *Lee Hung v. Acheson*, 103 F. Supp. 35;
> *Lee Hong v. Acheson*, 110 F. Supp. 60.

District Judge Foley for the District of Nevada on January 28, 1952 in considering a motion to dismiss in *Lee Hung* (supra) held as follows:

> "As a jurisdictional prerequisite it must appear from a complaint under 8 U.S.C.A. 903 that a plaintiff who claimed a right or privilege as a

national of the United States was denied such right or privilege by any department or agency, or executive officer thereof, upon the ground that he was not a national of the United States. No such denial appears in any of the complaints here."

"8(a), Federal Rules of Civil Procedure, 28 U.S.C.A. provides:

> 'Claims for Relief. A pleading which sets forth a pleading for relief, whether an original claim, counter-claim, cross-claim, or third party claim shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, * * *'

"Rule 12(h)(2), Federal Rules of Civil Procedure provides:

> 'That whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action * * *'

"Each of the complaints of the said plaintiffs should be dismissed for the reason that in none of the said complaints is there any compliance with rule 8(a)(1), Federal Rules of Civil Procedure, there being no allegation in any of said complaints that the plaintiff therein claimed and was denied a right and privilege as a national of the United States upon the ground that he is not a national of the United States."

In the case considered by Judge Foley, paragraph VII of the complaint quoted in the decision, alleges a re-

fusal to grant an application for travel documents, it not appearing by allegation how such refusal was accomplished. That allegation read as follows:

> "That for over six years last past the said plaintiff has presented various and sundry applications to the American Consul at Canton, China, and in the British Crown Colony at Hongkong for permission to enter the United States as a citizen thereof and/or for the purpose of having his claim to United States citizenship passed upon and adjudicated by the Immigration and Naturalization Service of the United States and, despite said repeated applications, the said plaintiff has been unable to secure a visa, permit, permission to travel to and enter the United States from said American Consul; and said American Consul has refused to grant said application for visa or permit to travel to the United States for reasons that are unknown to the plaintiff herein."

Here, too, the complaint alleged that inaction on the part of the American Consul in Hongkong amounted to a refusal by the said Consul to issue travel documents. In the instant case no direct refusal is claimed. On the other hand, the correspondence indicates that the State Department is still considering the application and has not indicated a disposition to deny or affirm the appellee's application for documentation.

For the court in this case to construe the failure of the American Consul at Hongkong to act, within

a period of time which the appellee deems reasonable, a denial of his application would be merely an assumption based on an argumentative allegation in the complaint which does not in any respect conform to the requirements for a denial set out in the statute. This would be in contradiction of the well settled principle that there is a presumption against the jurisdiction of a federal court, unless the contrary affirmatively appears in the record and any doubt should be resolved against jurisdiction.

Mansfield C. & L. M. Railway Company v. Swan, 111 U.S. 379;

In re Smith v. United States, 94 U.S. 455;

Baltimore & Ohio Railway Co. v. Thompson, 8 F. R. D. 96.

A positive allegation of the facts upon which federal jurisdiction is based must be alleged and jurisdiction can not be inferred argumentatively from the pleadings.

Hanford v. Davis, 163 U.S. 273.

The court, at page 280, said:

> "Essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one the Circuit Court is entitled to take cognizance."

Appellee in his brief lays great stress upon cases where the courts have denied motions to dismiss and

sustained the jurisdiction of the court but in none of these cases has the action been attacked for failure to allege jurisdictional facts in conformance with the Congressional mandate.

Appellee stresses *Acheson v. Yee King Gee*, 9th Circuit, 184 F .(2d) 382. The facts in the Yee King Gee case have no analogy to the situation presented here. An examination of the facts in that case discloses that Yee King Gee was issued a certificate of identity by the American Consul at Hongkong and proceeded to the United States and such facts were pleaded. The question raised there was one of venue. Improper venue in the instant case is not claimed. It is recognized that actions brought under section 503 do not come within the general venue provisions of the Federal Statutes but come within the exception, "except as otherwise provided by law."

The reported decisions cited by appellee are all cases wherein there was a specific denial of a right or privilege and a question of lack of such an allegation in the pleadings is not raised. As has been previously pointed out in the case of *Yee King Gee v. Acheson*, supra, a certificate of identity was issued pursuant to section 503 and the question was not raised in that case. In *Podeau v. Acheson*, 170 F. (2d) 721, the applicant was denied a passport by the

American Consul in Paris. In *Attorney General v. Ricketts*, 9th Circuit, 165 F. (2d) 193, and in *Bauer v. Clark*, 7th Circuit, 161 F. (2d) 397, a claim of citizenship was denied by the Attorney General by the institution of deportation proceedings. In *Brassard v. Biddle*, 148 F. (2d) 134, the Attorney General sought by institution of an action for cancellation to deprive the plaintiff of United States citizenship.

It is hardly correct to say that in the instant case all of the witnesses testified affirmatively "that the appellee is the person he claims to be." The most that can be said as to the testimony is that *someone told them* that appellee is the son of Lee Kut. This is pure unadulterated hearsay. Counsel cites in support of his contention that "hearsay" is competent evidence in this type of case *United States v. Wong Gong*, 70 F. (2d) 107, from which he quotes. That decision merely held that "hearsay" as to the time and place of birth is competent evidence. *No question of identity* was either presented or determined.

Date and place of birth and identity are two entirely different things. The one may be competent to show birth at a certain time and at a certain place, but it is quite another thing to show that the person whose birth is so proven is the identical person who claims to be the "blood" offspring of another. And

it is our insistance that it is "hearsay" for even the father who was not present at the birth relied entirely upon what someone else told him as to the birth of an alleged son, to identify appelle as his "blood" son. *Lee Sim v. United States*, 218 F. 432.

The statute § 903 T. 18 U.S.C. further provides:

> "*If such person is outside the United States and shall have instituted such action in court*, he may, *upon submission of a sworn application* showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, *obtain* from a diplomatic or consular officer of the United States in the foreign country in which he is residing *a certificate of identity stating that his nationality status is pending before the court; and may be admitted to the United States with* such certificate *upon condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States.*"
> (Italics supplied)

After, and *only after a denial* by the Consul of a *passport*, is a person in a foreign country authorized to invoke the aid of a United States District Court by the commencement of an action for declaratory judgment as to his nationality status, and then and then only must he make application to the consul in the foreign country for a "certificate of identity; *stating that his nationality status is pending before the court.*" This application entitles him to such certificate of identity, which, in the words of the statute

shall entitle him to be "admitted to the United States with such certificate *upon condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States.*"

Appellee elected *not to wait until the Consul had denied his application for a passport*, before commencing a suit for declaratory judgment, attempting to invoke the court's jurisdiction on the basis of *an expected eventual denial* to him of a passport; well knowing, according to his own pleading, that there were 1800 applications pending before the consul ahead of his, and by this method successfully sought to have a judicial determination of his nationality status ahead of those 1800 persons whose applications were being processed in the regular course and in the order of their filing with the American Consul, even though not personally present. The District Court apparently believed that the delay in passing upon the "passport" application was unreasonable and was tantamount to a denial of a "passport", notwithstanding that appellee's own pleading clearly negatived such an assumption and was of itself explanatory of the apparent delay.

The decree is therefore void for lack of jurisdiction and the District Court clearly erred in denying

appellant's motion to dismiss, and entering the decree, which should be set aside.

Counsel cites *Kawaguchi v. Acheson*, 184 F. (2d) 310 to sustain his contention that delay in acting is equivalent to denial.

That was not the issue litigated in that case. The appeal was from an order dismissing the action because plaintiff was not present and the refusal of the District Court to grant a continuance at the request of counsel representing him. True there is some language used in discussing the nature of the case, but that language is dictum. In any event, the court was there dealing with a "certificate of identity" after the institution of the suit which is provided for to entitle the person in the foreign country to come to the United States under bond to be present at the trial. There never has been a trial of that case in this district, as since the coming down of the mandate to the District Court, a stipulation for dismissal was entered (Cause No. 2068) January 30, 1953, and the plaintiff commenced a new action in the District Court for the district of Colorado.

Counsel still persists in arguing that a "passport" and "certificate of identity" are similar. They are not the same at all. There must be a denial of the former on appeal to the Secretary of State, who,

if he denies the appeal, *must state his reasons in writing*, then an action commenced and an application filed with the Consul in the foreign country for a "certificate of identity" to enable a plaintiff to travel to the United States under bond to prosecute his action.

This "certificate of identity" *must be issued* after and only after such person has exhausted his administrative remedy as above set out, to give the District Court jurisdiction.

There is an entire lack of evidence in this case that any of those jurisdictional steps were taken by appellee and therefore the District Court never did acquire jurisdiction.

Our reply to appellee's argument at page 15 of his brief on the question of the order to show cause why a travel document should not be issued simply is that an appeal from the final judgment brings up for review all interlocutory orders.

Counsel says that the court's ruling in refusing to vacate its order directed to the Secretary of State to show cause why he should not issue a travel document has not affected the ultimate result. We, of course, contend that it has, because had appellee not waived his right to be present, the court's order to show cause would still be effective if he had jurisdic-

tion to enter it and it would seem that we are entitled to a ruling from this court on the question of the District Court's power to issue the order he has refused to vacate on motion therefor.

Counsel argues that there was no motion for a blood grouping test. That is not true. See record, page 87.

To contend that Lee Kut is not a party to this action and therefore not amenable to an order for blood grouping test seems strange in view of the fact that it was he who "verified" the complaint as appellee's next friend (R. 8) and is therefore a party to this action.

CONCLUSION

Whether a formal motion to dismiss was ever filed or not is wholly immaterial because the question of jurisdiction of the District Court may be raised at any stage of the proceedings and even in this court on appeal for the first time. If the District Court did not have jurisdiction its decree is void.

It hardly needs citation of authority to state the proposition that jurisdiction cannot be conferred by consent of the parties.

Because of the importance of the matter and because of the large number of similar cases pending in this district, and the two districts in California as so clearly pointed out in the decision of Judge Goodman in the case of *Ly Shew, etc. v. Acheson*, 110 F. Supp. 50, cited at p. 43 of our opening brief, we earnestly urge an early decision.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

No. 13,695

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

APPELLEE'S PETITION FOR A REHEARING.

EDWARDS E. MERGES,
1511 Smith Tower, Seattle, Washington,
Attorney for Appellee and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 13,695

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the appellee and respectfully petitions the Court for a rehearing en banc upon the following grounds and for the following reasons:

1. CASES OF WONG WING FOO v. McGRATH, 196 F. 2d 120 AND MAR GONG v. BROWNELL, 209 F. 2d NO. 448 ARE IMPLIEDLY OVERRULED.

The opinion filed March 30, 1954, states on pages 3 and 4 that the appellee did not allege in his complaint that he had been denied any "right or privilege" as a national of the United States. Examination of the transcript at pages 5 and 6 shows that the complaint contained the following allegations:

"VIII.

"That in February of 1951 or approximately *one year ago,* the plaintiff's father, Lee Kut, caused to be prepared an identification affidavit stating his relationship to the plaintiff and all the particulars concerning him and that said identification affidavit was prepared for the purpose of securing from the American Consul General in Hong Kong, a travel document to enable the plaintiff to travel to the United States; and that *said identification affidavit was filed with said American Consul shortly thereafter* so the plaintiff would be eligible to purchase transportation to the United States in order to apply for admission here under the immigration laws as a citizen thereof, but that the Consul failed and neglected to take any action upon said application and on *October 11, 1951, wrote a letter stating that plaintiff had been interviewed at the office of the American Consul but had not presented sufficient evidence to enable the Consul to issue him a final document and that it was indefinite when any travel document would be issued* because there were approximately 1800

cases ahead of the plaintiff's but that there is in truth and in fact no good reason for such delay because the plaintiff has submitted adequate and competent evidence of his citizenship and right to come to the United States and that the *American Consul, upon information and belief of the plaintiff, has no intention of issuing the plaintiff a travel document and that a year's time is an unreasonable delay inasmuch as the plaintiff's right to a travel document could be determined on a basis of the affidavits submitted* and that in any event, the plaintiff is subject to examination by the United States immigration authorities but by reason of the American Consul's action aforesaid, *the plaintiff has been stopped from coming to the United States and from applying to and presenting his proof to the Immigration Service at a port of entry in the United States,* and that the said action of the American Consul has been referred or appealed to the Secretary of State upon information and belief of plaintiff. *That plaintiff is informed and believes and therefore alleges that no action will be taken upon said application and that if any action is taken on it, it will be unfavorable,* and that plaintiff has no other remedy at law or otherwise except the present one."

Section 503 is very broad in its terms. It says that

"If any person who *claims* a right or a privilege as a national of the United States is denied such right or privilege by any department or agency or executive official thereof upon the ground that he is not a national of the United

> States, *such person,* regardless of whether he is within the United States or abroad, *may institute an action* against the head of such department." (Italics ours.)

The exact right or privilege is not specified and it will be noted that a *claim* on the part of such person is sufficient to entitle him to relief under the statute. It is difficult to imagine how a statute could be made more broad. Surely the complaint in the instant case is sufficient and apparently it was so considered by the defendant since no motion to dismiss was made either prior to or at the time of trial.

What constitutes a denial of a right or privilege under the statute has been defined by this Court in the *Wong Wing Foo* case, supra, where Judge Denman, speaking for the Court, said:

> "Nothing in the above text suggests that the 'action * * * for a judgment declaring him to be a national' is to succeed some prior administrative proceeding. *This section is largely invoked where there has been no administrative proceeding at all.* Such is the case where the Department of State refuses to give a passport, Perkins v. Elg, 307 U.S. 325; Podea v. Acheson, 179 F. 2d 306 (Cir. 2); or where a consul refuses to register a person as a United States national, Acheson v. Mariko Kuniyuki, 189 F. 2d 741 (Cir. 9); *or refuses to allow a person claiming American citizenship to come to this country,* Acheson v. Yee King Gee, 184 F. 2d 382 (Cir. 9); or where American citizens acting under claimed duress have filed with the Attorney General notices of their

renunciation of citizenship and then later seek to have them set aside, McGrath v. Tadayasu Abo, 186 F. 2d 766 (Cir. 9) * * *

* * * * * * *

"We do not think the independence of the 903 action is lost in other cases where the denial of 'the right or privilege' is preceded by a hearing at which findings are made and a decision reached. The right to citizenship is a priceless thing and Congress in enacting Section 903 in 1940 well could have decided that citizenship should not be denied one possessing it, by an administrative proceeding. * * *" (Italics ours.)

It would appear that the opinion in the instant case is inconsistent with the opinion in the Wong Wing Foo case, supra, and the law, therefore, as to what constitutes denial of a right or privilege should be considered by the entire Court.

The trial Court in the instant case made the following findings (Tr. 24):

"IV.

"That in February of 1951 the plaintiff's father, Lee Kut, caused to be prepared an identification affidavit, stating his relationship to the plaintiff and all the particulars concerning the same and that said affidavit was prepared for the purpose of securing from the American Consul at Hong Kong a travel document to enable the plaintiff to travel to the United States; *and that said identification affidavit was filed with the American Consul but that the American Consul*

failed to grant the plaintiff any travel document." (Italics ours.)

This finding was made on a basis of *uncontroverted evidence* and we respectfully submit that the setting aside of the findings of the trial Court in this case overrules the case of *Mar Gong v. Brownell,* supra, where the Court said:

"Upon this appeal it is argued that such findings are clearly erroneous in that all of the witnesses testified positively that Mar Kwock Tong, admittedly an American citizen, married Chin Poy Sue and that the plaintiff, Mar Gong, was born to that marriage in China as the couple's second child. It is urged that this positive testimony was uncontradicted and we must follow the rule stated in *Ariasi v. Orient Ins. Co.* (9 Cir.), 50 F. 2d 548, 551, to the effect that in the absence of contradictory evidence and any inherent improbability in the testimony a court cannot arbitrarily reject the testimony of a witness which appears credible.

"This court has had occasion recently to uphold the findings made by the trier of facts which refused to credit a witness' testimony even although that testimony is not contradicted. National Labor Relations Bd. v. Howell Chevrolet Co., 204 F. 2d 79, 86 (affirmed Howell Chevrolet Co. v. Labor Bd., ... U.S. ....., Dec. 14, 1953)."

2. KIYOSHI KAWAGUCHI v. ACHESON, 9 CIR., 184 F. 2d 310, AND ACHESON v. NOBUO ISHIMARU, 9 CIR., 185 F. 2d 547 ARE OVERRULED.

The opinion filed March 30, 1954, stated that the District Court had no jurisdiction to require the issuance of a certificate of identity to permit the appellee to come to the United States for a hearing in accordance with Section 503 of the Nationality Act of 1940 upon the question of his nationality. This overrules the cases of *Kawaguchi,* supra, and *Ishimaru,* supra.

In the *Kawaguchi* case the Court said:

> "Where such an application is made in good faith and the claim of citizenship has a substantial basis, such a certificate must issue to enable the applicant to travel to the United States for the limited purpose of attending and testifying at the trial of his pending action."

In the *Ishimaru* case the Court said:

> "By this order the District Court but took a step toward final disposition of the merits of the case."

It is clear from the above quoted that the opinion in the *Kawaguchi* and *Ishimaru* cases and the opinion in the instant case are inconsistent.

SUMMARY AND CONCLUSION.

1. The opinion is inconsistent with the opinion in the case of Wong Wing Foo without specifically overruling it.

2. The opinion is inconsistent with the case of Mar Gong without specifically overruling it.

3. The opinion is inconsistent with the cases of *Kawaguchi* and *Ishimaru* without specifically overruling them.

While the Court states, "We disagree with, and decline to follow, decisions holding that District Courts had jurisdiction to make such orders in actions under Section 503 of the Nationality Act of 1940, 8 U.S.C., Section 903," it is not clear whether or not the *Kawaguchi* and *Ishimaru* cases are specifically overruled. In view of the quotations from the *Kawaguchi* and *Ishimaru* cases, it would appear that they cannot be distinguished in principle.

In final conclusion we submit the statement of the *Supreme Court* in the late case of *Johnson v. Eisentrager,* 70 S.Ct. 936 where it said:

> "The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection. If a person's claim to United States citizenship is denied by any official, Congress has directed our courts to entertain his action to declare him to be a citizen 'regardless of whether he is within the United States or abroad.' 54 Stat. 1171, 8 U.S.C. Section 903, 8 U.S.C.A. Section 903."

Dated, Seattle, Washington,
April 28, 1954.

Respectfully submitted,
EDWARDS E. MERGES,
Attorney for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Seattle, Washington,
April 28, 1954.

EDWARDS E. MERGES,
Attorney for Appellee
and Petitioner.

No. 13696

United States
Court of Appeals
for the Ninth Circuit.

PACIFIC AMERICAN FISHERIES, INC., a Corporation,

Appellant,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska First Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-26-53

No. 13696

United States
Court of Appeals
for the Ninth Circuit.

PACIFIC AMERICAN FISHERIES, INC., a Corporation,

Appellant,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska First Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-26-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

FAULKNER, BANFIELD AND BOOCHEVER,
First National Bank Building,
Juneau, Alaska,

For Appellant.

HON. J. GERALD WILLIAMS,
Territorial Attorney General, by
JOHN DIMOND,
Assistant,

For Appellee.

In the District Court for the Territory of Alaska
Division Number One at Juneau

Civil Cause No. 6621-A

PACIFIC AMERICAN FISHERIES, INC., a Corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Defendant.

COMPLAINT

Plaintiff complains and alleges of defendant and prays as follows:

First Cause of Action

I.

That plaintiff is a corporation organized under the laws of Delaware and qualified to do business in the Territory of Alaska, and it has paid all its corporation license fees due the Territory and complied with all laws relating to foreign corporations doing business therein, and it operates salmon canneries at Alitak, Kasaan, King Cove, Naknek, Nushagak, Petersburg, Port Moller, Shumagin and Excursion Inlet and on the floating cannery known as Floater #1; and it operated at all of these places during the years 1949 and 1950, except Excursion Inlet and Floater #1 which were operated in 1950 and 1951.

II.

That plaintiff is a taxpayer within the Territory of Alaska and it pays annually large sums in taxes and license fees to the Territory, and various other taxes, including taxes on real property in certain municipalities and school districts of the Territory, and it has been such taxpayer for many years prior to the date of this complaint.

III.

That the defendant M. P. Mullaney is the duly appointed and acting Commissioner of Taxation for the Territory of Alaska, and he was such at all times mentioned herein.

IV.

That plaintiff employs a large number of fishermen in the operation of its salmon canneries each year, and it did employ a large number of both resident and nonresident fishermen in its operations during the years 1949, 1950 and 1951, and it paid the defendant, as a license tax under the provisions of Chapter 66, Session Laws of Alaska, 1949, $50.00 for each nonresident fisherman in its employ for each year he was employed by the company, to wit: 1949, 1950 and 1951, paying a total of 696 separate fees of $50.00 each during those three years, which amounted to the sum of $34,800.00.

V.

That this sum of $34,800.00 was paid the defendant Commissioner of Taxation in 1949, 1950 and 1951, under duress, compulsion and protest and not

voluntarily, and in order to avoid criminal penalties imposed on the plaintiff under the provisions of Chapter 66 and in order to avoid irreparable loss of plaintiff's property. That attached hereto and made a part of this complaint as though fully set forth in this paragraph is a list of all nonresident fishermen employees of plaintiff for whom plaintiff paid the license fees, and the list sets forth the salmon canneries where these employees were employed, the dates of payment of the license fees in each case, the number of the check or draft by which paid, together with a summary or recapitulation of the names, dates, payments, etc., and which list and summary are marked Exhibit "A" and prayed to be read as a part of this paragraph as though fully set forth herein.

VI.

That the tax or license fee levied by the provisions of Chapter 66, Session Laws of Alaska, 1949, is invalid as to all amounts above $5.00 for each fisherman, so that the amounts paid the Tax Commissioner by plaintiff in 1949, 1950 and 1951, under duress, protest, compulsion and involuntarily, was $45.00 for each of the 696 names listed on Exhibit "A" and mentioned in Paragraph V above, making the total sum of $31,320.00.

VII.

That neither this sum of $31,320.00 nor any part thereof was due the defendant upon the dates of payment or at any other time, for the reason that the law under which it was paid was invalid and void as to these payments.

VIII.

That plaintiff has demanded a refund of the sum of $31,320.00 from the defendant, together with interest thereon from the dates of the several payments made by it, as set forth in Exhibit "A" hereto, but the defendant has not paid any part thereof, and the sum of $31,320.00, together with interest thereon at 6% per annum from the dates of the several payments thereof, is now due and owing from defendant to plaintiff.

Second Cause of Action

As a second and alternative cause of action against defendant, plaintiff alleges:

I.

Plaintiff re-alleges Paragraphs I, II, III, IV, and V of the First Cause of Action.

II.

That Chapter 66, Session Laws of Alaska, 1949, levied a valid tax on fishermen in the employ of plaintiff for the years 1949, 1950 and 1951 of $5.00 per annum for each fisherman employed, and plaintiff made to the defendant in those years an overpayment, or an amount in excess of the license fee due, on the 696 nonresident fishermen hereinabove referred to and whose names and places of employment are set forth in Exhibit "A" hereto, to which reference is hereby made; and this excess or overpayment was at the rate of $45.00 per annum for each man, or a total of $31,320.00, which sum was

paid through error and under compulsion and duress, and it was paid involuntarily.

III.

That demand was made on March 18, 1952, on the defendant for repayment of the sum of $31,320.00 to plaintiff, together with interest at the rate of 6% per annum from the dates of the several payments as shown on Exhibit "A" hereto. This demand was made in writing on the date aforesaid, but defendant has refused to pay any part thereof, and the sum aforesaid, to wit: $31,320.00, with interest as alleged, is now due and owing plaintiff from defendant.

Third Cause of Action

Plaintiff for a third and alternative cause of action against the defendant, alleges as follows:

I.

Plaintiff re-alleges all the allegations contained in Paragraphs I, II and III of its First Cause of Action.

II.

That defendant owes plaintiff the sum of $31,320.00, together with interest at 6% per annum on $3,960.00 from August 30, 1949; on $1,395.00 from November 4, 1949; on $1,530.00 from November 2, 1949; on $3.375.00 from July 18, 1949; on $360.00 from November 26, 1949; on $810.00 from November 19, 1949; on $855.00 from September 13, 1949; on $3,375.00 from July 18, 1949; on $360.00 on $4,590.00 from June 24, 1950; on $1,800.00 from

November 3, 1950; on $3,825.00 from July 17, 1950; on $540.00 from July 9, 1950; on $1,350.00 from August 24, 1950; on $855.00 from September 27, 1950; on $855.00 from July 15, 1950; on $1,575.00 from July 19, 1950; on $720.00 from August 17, 1950; and on $720.00 from June 26, 1951, all for money had and received from plaintiff.

Fourth Cause of Action

Plaintiff for a fourth and alternative cause of action against the defendant alleges as folows:

I.

Plaintiff re-alleges Paragraphs I, II, III, IV, V and VI of its First Cause of Action herein.

II.

That the license fees of $50.00 each per annum mentioned in the First Cause of Action were purported to be levied on the individual nonresident fishermen in plaintiff's employ. That these fishermen were all employed under contracts with plaintiff, and in some of those contracts the plaintiff agreed and bound itself to the employees to assume the payment of all fishermen's license fees validly imposed by the laws of Alaska, and in others the contracts provided that the plaintiff should pay all such license fees and deduct the amount thereof from wages due the individual fishermen. That pursuant to the several different contracts, the plaintiff paid the defendant the full sum of $34,800.00 during the years 1949, 1950 and 1951 as nonresident fisher-

men's license fees, which sum was paid under protest, duress, compulsion and involuntarily, and not otherwise, because of threats made by defendant and his deputies to invoke the criminal penalties of Chapter 66 imposed on plaintiff for having in its employ fishermen for whom the license tax was not paid. That the individual fishermen themselves refused to pay the tax.

III.

That plaintiff has operated salmon canneries at the places hereinabove set forth in its First Cause of Action and at other places in the Territory of Alaska for many years, and it has been the custom of the defendant and his deputies and his predecessors and various treasurers and tax collectors of the Territory of Alaska, to make collection of all fishermen's license fees and various other fees imposed upon employees of plaintiff, through the plaintiff at its various canneries, and a cooperative agreement has been in existence between the plaintiff and the defendant and all tax collection agencies in the Territory for many years for the convenience of the defendant and his predecessors and all the various tax collecting agencies in the Territory, by which the license fees and taxes of all resident and nonresident fishermen in the employ of plaintiff have been paid by it directly to the taxing authorities of Alaska from the funds of plaintiff, by means of its own checks or drafts, and this has been for the purpose of facilitating the collection of the tax by the defendant and the various tax collection

agencies of the Territory, through the years, so as to more efficiently and effectively collect the tax with a minimum of expense and maximum collections. That pursuant to this custom, the plaintiff has always kept complete records of its employees who are subject to license taxes and fees, including all fishermen's license fees, which records have been at all times available to the defendant, his predecessors, his deputies and all tax collecting agencies of the Territory, and all returns and all payments have been for years made to the defendant, his deputies, predecessors and tax collecting agencies, in this manner and solely for the purpose of assisting the Territorial taxing authorities in the collection of the Territory's revenue.

IV.

That in January, 1949, the Legislature of the Territory of Alaska enacted Chapter 66, Session Laws of Alaska, 1949, imposing a tax of $50.00 on nonresident fishermen and a tax of $5.00 on resident fishermen, and plaintiff's employees refused to pay this tax, during the year 1949. That the law, Chapter 66, makes it unlawful for any person, association or corporation to have in its employ any fisherman who shall not have paid the license fee, and it provides a penalty of $500.00 or not to exceed six months in jail for any violation of the Act, including the employment of fishermen for whom the license fee or tax has not been paid.

V.

That in July, 1949, the defendant sent his deputy to the cannery of the plaintiff at Naknek, Alaska, and demanded from the plaintiff the payment of the $50.00 license fee on each of its nonresident employees who were fishermen, and threatened criminal prosecutions against the plaintiff, and threatened to arrest plaintiff's officers and superintendents for having in its employ nonresident fishermen for whom the license fee had not been paid. Plaintiff at that time had expended more than $1,300,000.00 in preparation for the fishing and canning season at its various plants, which seasons are of short duration, during which all fishing and canning must be done, and it was threatened with irreparable damage and injury if it continued to employ nonresident fishermen for whom the license fee had not been paid. Its only alternative was to either pay the tax immediately itself or discharge so many nonresident fishermen that it would disrupt and destroy plaintiff's fishing and canning operations and subject it to a heavy loss, and plaintiff was obliged to pay immediately to the defendant's deputy the tax on 60 nonresident employees at Naknek at the rate of $50.00 each, and this was paid under compulsion, duress, threats of criminal prosecution, and in order to avoid heavy loss and damage to plaintiff and its property and to avoid imprisonment of its officers and superintendents; and this sum of $3,000.00 was paid to the tax collector on July 16, 1949. That the total sum of $34,800.00 paid as alleged in this com-

plaint, was paid by the plaintiff by means of its checks and from its own funds by agreement with the fishermen in its employ, as aforesaid, that the company would immediately bring suit in this court for the purpose of enjoining the defendant from collecting the nonresident fishermen's license tax, and, if successful, it would make restitution to the individual fishermen of that part of the fees which had been deducted from their wages.

VI.

That set forth in Exhibit "A" hereto attached and made a part of this complaint and opposite the names of the individual fishermen thereon listed, is a checkmark showing in each case whether the license fee was deducted by plaintiff from wages due the employee-fisherman or assumed and paid by the plaintiff from its own funds, pursuant to its contracts with its employees. The list shows, and plaintiff alleges, that of the total amount of the overpayment of license fees in 1949, 1950 and 1951 in the total sum of $31,320.00, which is the excess amount over and above the fee at $5.00 per annum per man, the sum of $21,780.00 was assumed and paid by the plaintiff from its own funds, and the sum of $9,540.00 was paid by the plaintiff, as aforesaid, was deducted by it from the wages of the employees, and paid by the plaintiff under the agreement made between the plaintiff and its employees to vigorously prosecute application for its refund and to challenge the validity of Chapter 66 in the courts.

VII.

That on August 5, 1949, plaintiff brought an action in the above-mentioned court against the defendant alleging the invalidity of Chapter 66, Session Laws of Alaska, 1949, and requesting an injunction against the defendant, his deputies, etc., enjoining them from collecting the tax on nonresident fishermen. Upon the institution of that suit, plaintiff obtained and filed a good and sufficient surety bond with the United States Fidelity & Guaranty Company, as surety thereon, in the sum of $16,000.00 to indemnity the defendant and protect him for the entire year 1949 in the payment of all license fees due from the plaintiff or from all of its nonresident fishermen. This bond covered the fee, at $50.00 each of all nonresident fishermen. That this was more than sufficient to cover all nonresident fishermen in the employ of plaintiff during that year and to fully protect the defendant in the payment of the nonresident fishermen's license fees, and the bond was a continuing bond conditioned to apply to the case until it should have been finally decided.

VIII.

That this court denied the preliminary injunction by written opinion on August 15, 1949, and order was entered on August 17, 1949, but suggested orally and in the written opinion that defendant might, under the circumstances, consent to the issuance thereof; but the court said that since defendant did not see fit to do so, the court was powerless to

grant plaintiff the relief prayed for. At that time the bond was already on file to fully protect defendant from any and all loss which might arise through any delay and in the case the law should be held to be valid.

IX.

That on June 25, 1951, the United States Court of Appeals for the Ninth Circuit rendered an opinion holding the entire nonresident fishermen's license fee in excess of $5.00 to be invalid and Chapter 66 of the Laws of 1949 to be void to that extent, and this opinion was affirmed by the United States Supreme Court on March 3, 1952.

X.

That on March 18, 1952, plaintiff made application in writing to the defendant for refund to it of the sum of $31,320.00 aforesaid which was the amount of license fees paid by it in excess of the valid fee of $5.00 per annum for each license, and it made application for interest on this excess amount of $31,320.00 from the dates of the several payments until paid, but the defendant has refused to refund to the plaintiff any part thereof.

XI.

That the defendant is now threatening, on advice of counsel, that if any portion of the fees are to be refunded, the payments will be made to the individual fishermen regardless of whether the plaintiff paid the entire amount and regardless of whether the entire fee was paid by the plaintiff and not de-

ducted from wages of employees; and plaintiff verily believes and fears that if any portion of the fees are refunded, they will be paid, not to the plaintiff who paid them to the defendant, but to the fishermen, and this to plaintiff's damage and loss in the sum of $21,780.00, with interest aforesaid.

XII.

Plaintiff further alleges that as a taxpayer of the Territory of Alaska, it will be obliged to press its suit for recovery of all license fees paid by it from its own funds regardless of whether the defendant shall have made payment to individual fishermen-licensee in cases where they did not pay or assume any portion of the tax, and in that event plaintiff alleges that it is entitled to recover, and, therefore, by making payment to the individual fisherman who did not pay any portion of the license fees, the defendant will be subjecting the Territory and the taxpayers thereof to an unwarranted loss in whatever amount shall have been paid these individual nonresident fishermen directly in those cases where the plaintiff is also entitled to the repayment; and plaintiff verily believes that unless restrained and enjoyed by this court, defendant may make payments to individual fishermen of amounts not due them, thereby subjecting the Territory and the taxpayers to a loss to that extent.

XIII.

That the sum of $3,000.00 is a reasonable attor-

ney's fee to be recovered from defendant for the prosecution of this suit.

Wherefore, plaintiff prays for judgment against defendant—

1. On either its First, Second or Third Causes of Action, in the sum of $31,320.00, together with interest thereon at the rate of 6% per annum computed from the dates of the several payments as fully set forth in Paragraph II of the Third Cause of Action herein, until paid; or

2. On its Third Cause of Action in the sum of $31,320.00, together with interest thereon as set forth in Paragraph II of its Third Cause of Action herein;

3. For plaintiff's costs and disbursements herein and an attorney's fee of $3,000.00;

4. That the court issue to defendant forthwith a temporary restraining order restraining and enjoining him from making payments of any of the sums hereinabove referred to to any person or corporation other than plaintiff and an order to appear before the court to show cause, on a date to be fixed by the court, why a preliminary injunction should not be issued against defendant enjoining him from making payments of any of the sums mentioned in the First, Second, Third and Fourth Causes of Action herein, together with interest thereon, to any person or corporation other than plaintiff;

5. That plaintiff have such other and further relief as is meet in the premises.

PACIFIC AMERICAN
FISHERIES, INC.,
Plaintiff,

By /s/ H. L. FAULKNER,
Its Agent and Attorney-in-Fact.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed March 31, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant moves the court to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted. The reasons are:

1. Plaintiff cannot invoke the provisions of §48-7-1 ACLA 1949 since plaintiff is neither the "taxpayer" within the meaning of that section nor the duly authorized representative of its fishermen employees upon whose behalf it purports to have instituted this action, and thus is not the "real

party in interest" within the meaning of Rule 17, Federal Rules of Civil Procedure; and

2. Plaintiff cannot recover independently of §48-7-1 ACLA 1949 since the Territorial Legislature, in enacting that statute, has substituted an exclusive remedy against the Territory for any remedy that may have existed at common law against the defendant Tax Commissioner for the recovery of taxes paid under an invalid law.

Dated at Juneau, Alaska, this 18th day of April, 1952.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska;

/s/ JOHN H. DIMOND,
Assistant Attorney General,
Attorneys for Defendant.

Service of Copy acknowledged.

[Endorsed]: Filed April 19, 1952.

In the District Court for the Territory of Alaska
Division Number One, at Juneau

No. 6621-A

PACIFIC AMERICAN FISHERIES, INC.,
Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Defendant.

OPINION

Filed July 12, 1952

H. L. Faulkner, of Faulkner, Banfield & Boochever, attorneys for plaintiff.

J. Gerald Williams, Attorney General of Alaska, and John Dimond, Assistant Attorney General, attorneys for defendant.

Plaintiff seeks recovery of monies paid to the Territory as license fees for nonresident fishermen. The license statute, Chapter 66 SLA 1949, in addition to placing taxes of $50 on nonresident fishermen and $5 on resident fishermen, made it unlawful for anyone to employ an unlicensed fisherman.

For administrative convenience fees were collected by the employers from the nonresidents so that the agents of the Territory could receive them at certain collection places rather than pursue fishermen over the Territory. In 1949, 1950 and 1951 some nonresident fishermen refused to obtain licenses. Since it was unlawful for plaintiff to continue to employ them unlicensed, it advanced the

amounts from its own funds, partially reimbursing itself by making deductions from the wages of some of the individual fishermen.

The statute, so far as taxing nonresidents in excess of $5, was held unconstitutional, Mullaney vs. Anderson, 342 U. S. 415, and it is this excess which plaintiff seeks to recover.

Plaintiff sues in its own right, and not as assignee of the fishermen. Defendant moves to dismiss for failure to state a claim on the grounds that plaintiff does not qualify under the tax refund statutes, and that the statutory remedy is exclusive. The complaint consists of two statutory counts, a common count for money had and received, and a fourth count seeking injunctive relief.

I am of the opinion that the complaint does not state grounds for equitable relief.

The hiring of unlicensed fishermen derogates from whatever standing in equity may be claimed for the plaintiff, and the argument that, if the defendant is allowed to make refund to the fishermen and the Court finds that a return must also be made to plaintiff, double payment and added expense to the Territory will be the consequences, which in turn will increase plaintiff's taxes, to its irreparable damage, is clearly insufficient.

Plaintiff also asserts that, if there is no remedy at law, equity should act. But this maxim presupposes a remedy which is inadequate and may not be invoked when there is in fact no remedy at law.

The statutory counts under Section 48-7-1 (a) and (b), ACLA 1949, turn largely on legislative in-

tent. Defendant contends that the definition should be "the person chargeable with the tax" or "the person owning property subject to the tax" and would probably also add that such person must have actually paid the tax itself. Plaintiff urges that the word should be defined simply as "the person who paid the tax."

The section cited has not been the subject of judicial decision, but it appears that the legislature had defendant's definitions in mind. When the tax is on property, a person paying the tax, who has some interest in the property, may recover. The cases cited by plaintiff deal with taxes levied against the payor or against property in which the payor had an interest. Some of them deal with a "statutory taxpaying representative" who is also allowed to recover. None of the cases fits the present situation. The excise here under consideration is a license, assessed against a person, not against property. Plaintiff has paid the personal tax of another, and the statutory remedies do not provide for this situation. Pacific American Fisheries vs. Mullaney, 191 F. (2d) 137, 140-1.

The real party in interest is the party who, by the substantive law of the forum, has the right sought to be enforced. Since under the statute the right is in the taxpayer, plaintiff cannot qualify as the real party in interest. It is to be noted that plaintiff is attempting to sue in its own right, and not as assignee for the fishermen. Although plaintiff attempts to place itself under the express trust provisions of Rule 17 (a) of the Federal Rules of

Civil Procedure so as to qualify as a real party in interest, it is clear that no trusts were formed between plaintiff and the fishermen, nor was there any intention to form such a relationship. Therefore, plaintiff does not qualify as a person suing in the place of the "taxpayer" who is given a remedy by the statute. Clark on Code Pleading, 2d Ed., Secs. 22 and 27; 2 Federal Practice and Procedure (Barron and Holtzoff), Sec. 482; 3 Moore's Federal Practice, Sec. 17.07.

The second count, under Section 48-7-1 (b) ACLA 1949 fails for the same reason set forth above, in that it contemplates an action by a taxpayer, and, since plaintiff is not the taxpayer, it is not the real party in interest, nor given a right by the statute. Moreover, this part of the statute was not designed to cover plaintiff's situation. "(T)hrough error, or otherwise" envisions an unconscious overpayment which was not known by the taxpayer to be incorrect at the time of making the return. Clerical error is indicated by the provision that the tax commissioner "on audit of the account" should make a refund. Implicit in this subdivision is the idea that the tax imposed was valid and has remained unchanged, but that the taxpayer, by the terms of the tax statute at the time of payment, has remitted too much.

The third count is a common law count for money had and received. Defendant contends that this will not lie because the statutory remedy is exclusive. At common law, a taxpayer had an action in the nature of assumpsit whenever taxes were paid under duress and coercion, and they were wrongfully assessed.

Section 48-7-1 (a) provides for refund of taxes paid under protest. At common law, no such refund could be secured on the basis of a mere protest. Section 48-7-1 (b) provides for return of overpayments, and does not even require a protest, let alone duress. At common law, no recovery was allowed in this situation either. Therefore, it would appear that two new means of recovery have been created, and, since the common law action, requiring protest, wrongful assessment and duress, is not mentioned, it is apparent that the statutory forms are in addition to the one already in existence. It would seem that the statutes were intended to liberalize recoveries by creating rights where formerly none existed. The statutes may well be exclusive as to the situations covered by them, but, since they do not cover the duress situation, an action based on duress will still lie.

Even though an action will still lie outside the statutes, its requisites are not fulfilled by the allegations in the third count. Payment under protest, duress and an invalid assessment are not alleged. Since it is insufficient on these grounds, it is unnecessary to determine whether or not plaintiff is the real party in interest as to that part of the claim which was deducted from the fishermen's wages.

The motion to dismiss is, therefore, granted. Plaintiff is allowed ten days in which to amend.

/s/ GEORGE W. FOLTA,
Judge.

[Endorsed]: Filed July 12, 1952.

[Title of District Court and Cause.]

ORDER

This cause came on for hearing before the court on May 2, 1952, on defendant's motion to dismiss duly served and filed herein. Whereupon, after hearing arguments of counsel for the respective parties, after due consideration of the files and records in this case and the briefs filed herein, and the court being fully advised in the premises, it is hereby

Ordered, that plaintiff's complaint be, and it hereby is dismissed, and plaintiff is allowed ten days in which to amend.

Done in open court at Juneau, Alaska, this 17th day of July, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed July 17, 1952.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff complains and alleges of defendant and prays as follows:

I.

That plaintiff is a corporation organized under the laws of Delaware and qualified to do business in the Territory of Alaska, and it has paid all its corporation license fees due the Territory and complied with all laws relating to foreign corporations doing business therein, and it operates salmon canneries at Alitak, Kasaan, King Cove, Naknek, Nushagak, Petersburg, Port Moller, Shumagin and Excursion Inlet and on the floating cannery known as Floater #1; and it operated at all of these places during the years 1949 and 1950 except Excursion Inlet and Floater #1 which were operated in 1950 and 1951.

II.

That plaintiff is a taxpayer within the Territory of Alaska and it pays annually large sums in taxes and license fees to the Territory, and various other taxes, including taxes on real property in certain municipalities and school districts of the Territory, and it has been such taxpayer for many years prior to the date of this complaint.

III.

That the defendant M. P. Mullaney is the duly appointed and acting Commissioner of Taxation for

the Territory of Alaska, and he was such at all times mentioned herein.

IV.

That plaintiff employs a large number of fishermen in the operation of its salmon canneries each year, and it did employ a large number of both resident and nonresident fishermen in its operations during the years 1949, 1950 and 1951, and it paid the defendant, as a license tax under the provisions of Chapter 66, Session Laws of Alaska, 1949, $50.00 for each nonresident fisherman in its employ for each year he was employed by the company, to wit: 1949, 1950 and 1951, paying a total of 695 separate fees of $50.00 each during those three years, which amounted to the sum of $34,750.00.

V.

That in January, 1949, the Legislature of the Territory of Alaska enacted Chapter 66, Session Laws of Alaska, 1949, imposing a tax of $50.00 on nonresident fishermen and a tax of $5.00 on resident fishermen, and plaintiff's employees refused to pay this tax, during the year 1949. That the law, Chapter 66, makes it unlawful for any person, association or corporation to have in its employ any fisherman who shall not have paid the license fee, and it provides a penalty of $500.00 or not to exceed six months in jail for any violation of the Act, including the employment of fishermen for whom the license fee or tax has not been paid.

VI.

That this sum of $34,750.00 was paid the defendant Commissioner of Taxation in 1949, 1950 and 1951, under duress, compulsion and protest and not voluntarily, and in order to avoid criminal penalties imposed on the plaintiff under the provisions of Chapter 66 and in order to avoid irreparable loss of plaintiff's property. That attached hereto and made a part of this complaint as though fully set forth in this paragraph is a list of all nonresident fishermen employees of plaintiff for whom plaintiff paid the license fees, and the list sets forth the salmon canneries where these employees were employed, the dates of payment of the license fees in each case, the number of the check or draft by which paid, together with a summary or recapitulation of the names, dates, payments, etc., and which list and summary are marked Exhibit "A" and prayed to be read as a part of this paragraph as though fully set forth herein.

VII.

That the tax or license fee levied by the provisions of Chapter 66, Session Laws of Alaska, 1949, is invalid as to all amounts above $5.00 for each fisherman, so that the amounts paid the Tax Commissioner by plaintiff in 1949, 1950 and 1951, under duress, protest, compulsion and involuntarily, and under an invalid assessment, was $45.00 for each of the 695 names listed on Exhibit "A" and mentioned in Paragraph VI above, making a total sum of $31,275.

VIII.

That neither this sum of $31,275.00 nor any part thereof was due the defendant upon the dates of payment or at any other time, for the reason that the law under which it was paid was invalid and void as to these payments.

IX.

That set forth in Exhibit "A" hereto attached and made a part of this complaint and opposite the names of the individual fishermen thereon listed, is a checkmark showing in each case whether the license fee was deducted by plaintiff from wages due the employee-fisherman or assumed and paid by the plaintiff from its own funds, pursuant to its contracts with its employees. The list shows, and plaintiff alleges, that of the total amount of the overpayment of license fees in 1949, 1950 and 1951 in the total sum of $30,105.00, which is the excess amount over and above the fee $5.00 per annum per man, the sum of $20,610.00 was assumed and paid by the plaintiff from its own funds, and the sum of $9,495.00 was paid by the plaintiff, as aforesaid, was deducted by it from wages of the employees, and paid by the plaintiff under the agreement made between the plaintiff and its employees to vigorously prosecute application for its refund and to challenge the validity of Chapter 66 in the courts.

X.

That the license fees of $50.00 each per annum mentioned in the fourth paragraph above were purported to be levied on the individual nonresident fisherman in plaintiff's employ. That these fisher-

men were all employed under contracts with plaintiff, and in some of those contracts the plaintiff agreed and bound itself to the employees to assume the payment of all fishermen's license fees validly imposed by the laws of Alaska, and in others the contracts provided that the plaintiff should pay all such license fees and deduct the amount thereof from wages due the individual fishermen. That, pursuant to the several different contracts, the plaintiff paid the defendant the full sum of $34,750.00 during the years 1949, 1950 and 1951 as nonresident fishermen's license fees, which sum was paid under protest, duress, compulsion, involuntarily, and under a void and invalid assessment, and not otherwise, because of threats made by defendant and his deputies to invoke the criminal penalties of Chapter 66 imposed on plaintiff for having in its employ fishermen for whom the license tax was not paid. That the individual fishermen themselves refused to pay the tax.

XI.

That defendant owes plaintiff the sum of $30,105.00, together with interest at 6% per annum on $3,915.00 from August 30, 1949; on $1,395.00 from November 4, 1949; on $1,530.00 from November 2, 1949; on $3,375.00 from July 18, 1949; on $360.00 from November 26, 1949; on $810.00 from November 19, 1949; on $855.00 from September 13, 1949; on $2,205.00 from September 2, 1949; and on $4,590.00 from June 24, 1950; on $1,800.00 from November 3, 1950; on $3,825.00 from July 17, 1950; on $540.00 from July 9, 1950; on $1,350.00 from August 24,

1950; on $855.00 from September 27, 1950; on $855.00 from July 15, 1950; on $405.00 from July 19, 1950; on $720.00 from August 17, 1950; and on $720.00 from June 26, 1951, all for money had and received from plaintiff, which was paid defendant under duress, protest, compulsion, involuntarily, and under a void assessment.

XII.

That the sum of $3,000.00 is a reasonable attorney's fee to be recovered from defendant for the prosecution of this suit.

Wherefore, plaintiff prays for judgment against defendant—

1. In the sum of $30,105.00, together with interest thereon at the rate of 6% per annum computed from the dates of the several payments, as fully set forth in Paragraph XI herein, until paid;

2. For plaintiff's costs and disbursements herein and an attorney's fee of $3,000.00.

PACIFIC AMERICAN
FISHERIES, INC,
Plaintiff,

By /s/ H. L. FAULKNER,
Its Agent and
Attorney-in-Fact.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,
Attorneys for Plaintiff.

Pacific American Fisheries, Inc.

Recapitulation of Non-Resident Fishing Licenses Paid for at $50.00 Each on Which $45.00 Each Is Claimed for Refund

Cannery	Date	Draft No.	No. of Licenses	Amount paid at $50 ea.	Amount would be at $5 ea.	Claim for Refund	Payment Company	Absorbed by Individual
Alitak	8-30-49	41732	88	$ 4,400	$ 440	$ 3,960	$ 1,710	$2,250
	6-24-50	44087	102	5,100	510	4,590	2,160	2,430
Kasaan	11- 4-49	104	31	1,550	155	1,395	1,395	.....
	11- 3-50	136	40	2,000	200	1,800	1,800	.....
King Cove	11- 2-49	45433	34	1,700	170	1,530	1,485	45
	7-17-50	48379	85	4,250	425	3,825	3,645	180
Naknek	7-16-49	45774	60	2,955	300	2,655	.....	2,700
	7-18-49	45776	15	750	75	675	.....	675
Nushagak	11-26-49	46842	8	400	40	360	.....	360
	7- 9-50	49352	12	600	60	540	.....	540
Petersburg	11-19-49	47318	18	900	90	810	810	.....
	8-14-50	50048	29	1,450	145	1,305	1,305	.....
	8-24-50	7911(ck.)	1	50	5	45	45	.....
Port Moller	9-13-49	47525	19	950	95	855	765	90
	9-27-50	50603	19	950	95	855	585	270
Shumagin	9- 2-49	48893	49	2,450	245	2,205	2,205	.....
	7-15-50	50830	19	950	95	855	855	.....
Floater #1	7-19-50	51782	35	1,750	175	405	405	.....
	6-26-51	51302	16	800	80	720	720	.....
Ex-Inlet	8-17-50	50057	16	800	80	720	720	.....
		Totals	696	$34,800	$3,480	$30,105	$20,610	$9,495

Duly verified.
Receipt of copy acknowledged.
[Endorsed]: Filed July 15, 1952.

[Title of District Court and Cause.]

ANSWER

Defendant answers plaintiff's Amended Complaint as follows:

First Defense

1. Defendant admits the allegations in Paragraph I.

2. Answering Paragraph II, defendant admits that "plaintiff is a taxpayer within the Territory of Alaska," but with respect to the remaining allegations, defendant is without knowledge or information sufficient to form a belief as to the truth thereof, and, therefore, denies the same.

3. Defendant admits the allegations in Paragraph III.

4. Defendant admits the allegations in Paragraph IV.

5. Answering Paragraph V, defendant admits the allegations contained therein with the exception of the allegation that "plaintiff's employees refused to pay this tax, during the year 1949." Defendant denies this allegation because it is too general—the actual facts, defendant alleges, were these: Some of plaintiff's employees in 1949 at first refused to pay their license fees, but after discussion with defendant's deputies, they later agreed to and did pay such fees.

6. Answering Paragraph VI, defendant admits

all allegations with the exception of that contained in the first sentence thereof. With respect to such allegation, defendant alleges that the duplicate receipts, or licenses, of approximately 212 of the persons listed in plaintiff's Exhibit "A" were stamped "Paid Under Protest," but that none of the $34,750.00 which plaintiff alleges it has paid defendant was paid involuntarily by plaintiff or by reason of any duress or compulsion exercised by defendant or any of his deputies.

7. Answering Paragraph VII, defendant admits the allegations therein with the exception of the allegation that the amounts paid the Tax Commissioner were paid "under duress, protest, compulsion and involuntarily."

8. Answering Paragraph VIII, defendant admits the allegations therein with the exception of the allegation that the amounts paid defendant were not due on the dates of payment.

9. Answering Paragraph IX, defendant admits the allegations therein with the exception of those allegations pertaining to certain contracts and agreements between plaintiff and its employees. Defendant denies these allegations since he is without knowledge or information of such contracts or agreements sufficient to form a belief as to the truth of the allegations relating thereto.

10. Answering Paragraph X—

(a) Defendant admits that license fees of $50.00 each per annum mentioned in the fourth paragraph

of plaintiff's amended complaint were not only purported to be levied but were levied and imposed upon the individual nonresident fishermen in plaintiff's employ;

(b) Defendant denies the allegations pertaining to contracts between plaintiff and its employees contained in the second and third sentences of Paragraph X for the reason that defendant is without knowledge or information of such contracts sufficient to form a belief as to the truth of the allegations relating thereto;

(c) Defendant admits that he received from plaintiff the sum of $34,750.00 during the years 1949, 1950 and 1951 as nonresident fishermen license fees;

(d) With respect to the allegation that this "sum was paid under protest, duress, compulsion, involuntarily * * * and not otherwise," defendant alleges that the duplicate receipts, or licenses, of approximately 212 of the persons listed in plaintiff's Exhibit "A" and from whom deductions for license taxes were made, were stamped "Paid under Protest," but defendant denies that these amounts were paid involuntarily or under protest by plaintiff or by reason of any duress or compulsion exercised by defendant or any of his deputies, and defendant alleges that at no time was any duress or compulsion exerted upon plaintiff by defendant or any of his deputies;

(e) Defendant denies that any threats were ever made by him against plaintiff to invoke the criminal penalties of Chapter 66 imposed upon plaintiff for

having in its employ fishermen for whom the license tax was not paid, and, on information and belief, defendant denies that any such threats were ever made by any of defendant's deputies;

(f) Defendant denies the allegation that "the individual fishermen themselves refused to pay the tax" because this allegation is too general—the actual facts, defendant alleges, were these: Some of plaintiff's employees in 1949 at first refused to pay their license fees, but after discussion with defendant's deputy they later agreed to and did pay such fees.

11. Defendant denies the allegations in Paragraph XI.

12. Defendant denies the allegations in Paragraph XII.

Second Defense

With respect to the amounts that plaintiff alleges it has deducted from the wages of its fishermen employees, the amended complaint fails to state a claim against defendant upon which relief can be granted because plaintiff is not the owner of those claims sued upon, but such claims belong to those persons listed in plaintiff's Exhibit "A" from whom such deductions were made, and plaintiff is neither the agent nor the representative, nor in any way authorized to present such claims to this court, and is thus not the real party in interest within the meaning of Rule 17, Federal Rules of Civil Procedure.

Third Defense

Even if plaintiff had some interest in this litigation sufficient to allow it to be a real party in interest with respect to the amounts that plaintiff alleges it has deducted from the wages of its fishermen employees, those persons named in plaintiff's Exhibit "A" from whom such deductions were made are indispensable parties to this action and have not been made parties. The reasons that they are indispensable parties are these: (1) the face of the amended complaint shows that these persons paid the taxes themselves and that they and not plaintiff are thus entitled to refunds, if any, that the defendant may be obliged to make; and (2) such claims for refunds have not been assigned to plaintiff.

Fourth Defense

The amended complaint fails to state a claim against defendant upon which relief can be granted as far as plaintiff's prayer for costs is concerned, because this suit, in practical effect, is one against the Territory of Alaska in its sovereign capacity, the Territory is not liable for costs unless specifically made so by some provision of statute, and no such statute exists.

Wherefore, defendant prays for judgment as follows:

1. That this action be dismissed;

2. That defendant have his costs incurred herein; and

3. That defendant be allowed a reasonable attorney's fee.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ JOHN H. DIMOND,
Assistant Attorney General,
Attorneys for Defendant.

Service of copy acknowledged.
[Endorsed]: Filed July 18, 1952.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Defendant amends by interlineation his answer filed herein in the following particulars, to wit:

By striking the words: " * * * and, on information and belief, defendant denies that any such threats were ever made by any of defendant's deputies," contained in sub-paragraph (e) of paragraph 10, and by substituting therefor the following:

" * * * but defendant admits that on not more than two occasions such threats were made by one of defendant's deputies."

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska,

/s/ JOHN H. DIMOND,
Assistant Attorney General,
Attorneys for Defendant.

Service of copy acknowledged.
[Endorsed]: Filed July 23, 1952.

[Title of District Court and Cause.]

OPINION

Filed November 10, 1952

In Mullaney vs. Anderson, 342, U.S. 415, Chap. 66 S.L.A. 1949, imposing a license tax of $50 on non-resident fishermen as against $5 on resident fishermen, was held unconstitutional as to the excess of $45. By this action the plaintiff seeks a refund of $30,105 in license fees paid by it for the years 1949, 1950 and 1951 for and on behalf of the non-resident fishermen employed by it as well as those from whom it merely bought fish.

The first complaint in this action was held insufficient, Pacific American Fisheries, Inc. vs. Mullaney, 105 Fed. Supp. 907, but the plaintiff was allowed to amend its complaint to allege that the assessment of the tax was wrongful and that payment thereof was made under protest and duress—the essentials of a claim for refund under the common law. The amended complaint alleges the payment by plaintiff of $20,610 from its own funds pursuant to a provision of its contract with the fishermen requiring it to pay the license taxes, and $9,495 from funds derived by way of deductions from the earnings of the fishermen and the wages of other employees who are included within the statutory definition of "fisherman"; that the tax was wrongfully assessed and that the payments referred to were made under protest and duress.

The plaintiff operates canneries in various sections of the Territory and is compelled to import the bulk of its employees each season from the

states because local fishermen are not available in sufficient numbers. For the mutual convenience of the Territory and the salmon packers, including the plaintiff, it has been their practice to remit by their own checks the license tax fees due from its fishermen.

The act became effective March 21, 1949. So far as pertinent to this controversy, it provides that:

> "It shall be unlawful for any person, association or corporation, or for the agent of any person, or for the officer or agent of any association or corporation, to have in his, their or its employ any fisherman who is not duly licensed under this Act or to purchase fish from any fisherman who is not so licensed. * * *
>
> "* * * Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding $500 or imprisonment not to exceed six months, or to both such fine and imprisonment."

The non-resident fishermen effectively shifted the burden of this tax to the plaintiff by means of the following provision in their employment contracts:

> "Territorial fishing licenses, when required, shall be paid by the Company for men covered by this agreement who work exclusively for the Company."

This provision was in effect during the entire period of this controversy. Some of the contracts allowed the employer to deduct the license fees

from the wages or earnings of the fishermen. Obviously, in these instances the plaintiff was a mere agent for the remission of the money, with no right to claim a refund.

Plaintiff argues, however, that it has an "understanding" or "agreement" with the fishermen to recover for them that part of the payments which it deducted from their wages. This is wholly insufficient in the absence of an assignment. As to the payments made under the quoted provision, the plaintiff claims it is entitled to a refund in its own right.

Before the opening day of the fishing season in 1949 most of the fishermen employed under the contract had signed license applications and delivered them to the plaintiff in accordance with the practice referred to. Plaintiff, however, began operations without having paid the license fees. When the tax collector visited its Naknek plant on July 6, 1949, and requested payment, there was some reluctance or unwillingness to pay because the plaintiff and the fishermen were of the opinion that the tax was invalid. Thereupon the tax collector warned the plaintiff's officers and fishermen that they were subject to arrest and prosecution, the former for employing unlicensed fishermen and the latter for not paying the tax. But it should be pointed out in this connection that not only was the collector not empowered to make arrests but that no formal complaint was ever lodged with any magistrate charging the plaintiff or any of its officers with a violation of the Act. On a subsequent

call at the plant on July 16, the applications were turned over to him and thereafter the fees were paid by the plaintiff as stated. Protest was made at the time some of the payments were made, and some of the applications and licenses bear the notation that the fee was paid under protest. At that time the plaintiff was engaged in the prosecution of a suit to have the tax declared invalid, and points to this as further proof of protest.

The instant action is in the nature of a test case, with a relatively small amount of the total sum collected under the statute at stake. The defendant, conceding it has no right to retain the money, asserts that its only interest is to protect itself from future liability on the same claims.

In essence the plaintiff's claim rests on the fact that it actually delivered the monies to the Territory, and that by reason of the peculiar circumstances under which this industry operates, its labor relations, and the terms of the statute, it was forced to make the payment and bear the burden of the tax. It contends that the collector demanded that it pay the tax and that, therefore, it was compelled to pay to avoid the penalties of the act and the disruption of its business, and in support thereof argues that the provisions of the act are self-executing and that since the Act was declared unconstitutional, the assessment of the tax was invalid.

Defendant contends that the plaintiff is not the real party in interest, that the fishermen are indispensable parties, that the acts of the collector were not such as to support a finding of duress, and that

the protest was insufficient. It is unnecessary to consider all of these contentions, in view of the conclusions reached.

The principal question is whether payment of the tax was made under duress, coercion and an invalid assessment. Correlative questions, important only if an affirmative answer is given to the foregoing question, are whether, as to the taxes paid pursuant to plaintiff's contract with the fishermen, the fishermen are indispensable parties; and whether, as to the taxes deducted from the pay and earnings of the fishermen, the plaintiff is the real party in interest.

So far as plaintiff's claim rests on its making the actual delivery of the monies there is no dispute. The established practice of paying the tax to the Territory had been adopted from considerations of mutual benefit and convenience, such as economy in collection and avoidance of interruptions with plaintiff's fishing and other operations. This procedure was followed here, although it was not required by statute.

Irrespective of this procedure and the practical assumption of the tax by the plaintiff under its labor contracts, the incidence of the tax remains on the fishermen. As between the plaintiff and its fishermen, the only effect of the contract provision is to augment their compensation. If compensation in this form fails because of the invalidity of the tax, it is the fishermen who are entitled to a refund. Economically, the diffusion theory of tax incidence makes plaintiff's claim of carrying the

burden of the tax rather dubious. New Consumers Bread Co. vs. Commissioner, 115 Fed. (2) 162. The real dispute arises over the reasons why plaintiff made the actual delivery. Plaintiff claims that because the statute made it unlawful to employ unlicensed fishermen, and because the fishermen refused to pay for the licenses themselves, it was forced to pay in order to protect its investment and continue its business. But the statute did not require the plaintiff to pay the tax. It is not directed in terms or in practical operation against employers. The tax collector was familiar with the provisions of the act and the practice referred to when he called at plaintiff's plant. It is abundantly clear that his request for payment was made pursuant to the established practice and not for any notions of liability of the plaintiff. Equally unavailing is the contention that the provisions of the act are self-executing. It may be that they are of such character in the sense that they require no complementary legislation to make them effectual or operative. But they are not self-executing as that term is used in the law of duress because the act is devoid of any provision authorizing summary seizure, distraint or forfeiture of property, franchise, the right to sue, or providing for the immediate accrual or acceleration of penalties or interest. Gaar, Scott & Co. vs. Shannon, 223 U.S. 468, 471. The penalties of the statute may be invoked only upon the doing of affirmative acts and after according the one charged a reasonable opportunity to challenge its validity in the traditional fashion.

Thus it would appear that the statute alone did

not compel plaintiff to make this payment; but it may well be that the sanctions of the statute, in conjunction with plaintiff's contractual obligation, left it no alternative, for it could not have compelled the fishermen to pay the tax without breaching its contracts and risking a labor dispute. It could not have discharged all of its unlicensed employees because they were irreplaceable, at least during the season of 1949. It could not have continued in its employment, or bought fish from, unlicensed fishermen without risking prosecution. Ceasing operations would have resulted in the loss of its investment. Under these circumstances, plaintiff asserts that to characterize the payment as "voluntary" is not realistic. It would, therefore, appear that the plaintiff's contention that payment was made under duress is reducible to the proposition that irrespective of the absence of at least some of the elements of duress, the situation which confronted it in July, 1949, was so fraught with risk of pecuniary loss that the request of the collector was itself sufficient to transform the situation into one of duress. In answering this contention, it may not be amiss to make some observation on the nature of duress as that term is used in tax law.

It has been pointed out that tax refunds are a matter of governmental grace, New Consumers Bread Co. v. Commissioner, supra. Nevertheless where the payment is made involuntarily, it may be recovered. In recent decisions, the courts have been more indulgent toward the degree and type of compulsion required to render a payment involuntary,

Parsons vs. Anglim, 143 Fed. (2) 534. Here it appears that if any improper influence was exerted upon the plaintiff, it is traceable to the bargaining power of the fisherman rather than to the statute or the request of the collector. Extensive research has not revealed any decision allowing recovery where the force, duress, or coercion was not the product of governmental action, but rather the result of the actions of independent parties, Brumagim vs. Tillinghast, 18 Cal. 265; 79 Am. Dec. 176 Anno. 64 A.L.R. 51. The usual definitions of compulsion, resulting from demand and seizure or threatened seizure of the taxpayer's person or property, are not apposite because here the tax was not placed by statute upon the plaintiff. It should be pointed out here that "demand" in tax law is a term of art. In the legal sense a demand may be made only upon the one who by express provisions of the statute is made liable for the tax. The request of the tax collector, therefore, did not constitute a demand and hence there could have been no seizure of plaintiff's officers or its property for nonpayment of the tax imposed on its fishermen, from which it follows that an essential element of duress, that of demand, is entirely lacking. Nor was any threat of seizure made. Atchison, etc., Ry. Co. vs. O'Connor, 223 U.S. 280; Gaar, Scott & Co. vs. Shannon, supra, and the annotations at 64 A.L.R. 9, 84 A.L.R. 294, 48 A.L.R. 1381, 74 A.L.R. 1301. Enforcement of the penalties for hiring unlicensed fishermen could not effect the collection of the tax from plaintiff. While the tax was on the fishermen employed by plaintiff, the individual fisher-

men cannot be considered "property" of the plaintiff so that it could be said that payment was in effect made to protect plaintiff's interest in them, as is often the case where real property is concerned.

The authorities cited by plaintiff are inapposite because in each there was an actual or anticipated demand made by the government upon the person who paid the money, Parsons vs. Anglim, supra; White vs. Hopkins, 51 Fed.(2) 159; Ward vs. Bd. of Co. Comm., 253 U.S. 17; Smart vs. United States, 21 Fed. (2) 188; and upon whom the statute placed the tax. Security Nat'l Bank vs. Young, 55 Fed (2) 616; Ratterman vs. Am. Exp. Co., 49 Ohio St. 608, 32 N.E. 754; City of Franklin vs. Coleman Bros., 152 Fed. (2) 527; Atchison, etc., Ry. Co. vs. O'Connor, supra; Ward vs. Bd. of Co. Comm., supra. These crucial elements are lacking here. Moreover, in the cases cited the payer delivered the money pursuant to actual or anticipated demand, under duress of the execution or threatened execution of the tax collection remedies and penalties designed to operate against the person or property of the payer. Not only was no demand made here, but there was no threat to invoke or pursue any remedy for the collection of the tax from the person or property of plaintiff. It would appear, therefore, that the plaintiff paid the tax of another without demand and without being compelled by law to do so.

Some of the cases cited by the plaintiff deal with situations where the tax was on property in which the payer had an interest, McFarland vs. Cent. Nat'l Bank, 26 Fed. (2) 890; Smart vs. United States, supra; City of Franklin vs. Coleman Bros., supra;

Pederson vs. Stanley Co. 34 S.D. 560, 149 N.W. 522; Carpenter vs. Shaw, 280 U.S. 363; or the refund was allowed under statutory provisions liberalizing recoveries, Parsons vs. Anglim, supra, and hence are readily distinguishable from the instant case. Moreover, in none of the cases cited was the money delivered pursuant to a contract with the person who was supposed to pay the tax, as was done in the case at bar. Thus the decisions cited by the plaintiff offer neither precedent nor analogy for recovery here.

An additional ground for denying recovery is that the right to a refund belongs to the fishermen. The fifty-dollar license purchased for them by the company was additional compensation for their services, the essential nature of which was not affected by the circumstance that it was paid to the Territory in satisfaction of their tax liability. The fishermen are entitled to the benefit of their agreement whether it takes the form of a refund or a license; and since the contracts are negotiated before each fishing season, it would seem that payment of the fifty-dollar fee must have been within the contemplation of the parties irrespective of its validity.

For the reasons stated, I conclude that the payments were not made under duress imposed by the defendant and that the plaintiff is not the real party in interest. Accordingly, the plaintiff is not entitled to recover.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed November 10, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the court on September 23, 1952, on plaintiff's amended complaint and the answer and amendment thereto of defendant to plaintiff's amended complaint. Plaintiff was represented by H. L. Faulkner of Faulkner Banfield and Boochever of Juneau, Alaska; defendant was represented by J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General. Evidence was adduced before the court on behalf of plaintiff and defendant, arguments were made and briefs filed by counsel for plaintiff and defendant, and the cause was submitted for judgment on September 23, 1952. On November 10, 1952, the court rendered its written opinion, which was on that day filed with the clerk of court. The court now makes the following:

Findings of Fact.

1. Plaintiff is a corporation organized under the laws of Delaware and qualified to do business in the Territory of Alaska, and it has paid all its corporation license fees due the Territory and complied with all laws relating to foreign corporations doing business therein, and it operates salmon canneries at Alitak, Kasaan, King Cove, Naknek, Nushagak, Petersburg, Port Moller, Shumagin and Excursion Inlet and on the floating cannery known as Floater

#1; and it operated at all of these places during the years 1949 and 1950 except Excursion Inlet and Floater # 1 which were operated in 1950 and 1951.

The defendant M. P. Mullaney is the duly appointed and acting Commissioner of Taxation for the Territory of Alaska, and he was such at all times mentioned herein.

2. This is an action to recover from defendant the sum of $30,105.00 in license taxes imposed under the provisions of Chapter 66, Session Laws of Alaska, 1949, and paid by plaintiff for the years 1949, 1950 and 1951 for and on behalf of 669 nonresident fishermen employed by plaintiff. The basis for this action is a contention that the taxes were wrongfully assessed, and that the payments thereof were made under protest and duress. Of the total amount for which a refund is sought, $20,610.00 represents money paid by plaintiff from its own funds pursuant to a provision in its employment contracts with certain of its fishermen employees requiring it to pay such license taxes, and $9,495.00 represents money paid by plaintiff by way of deductions from the wages of other of its fishermen employees, pursuant to contracts with such fishermen.

3. For the mutual convenience of plaintiff and defendant, it had been the established practice (a) for plaintiff's fishermen employees, before the opening of the fishing season each year, to fill out and sign applications for the licenses required under Chapter 66, Session Laws of Alaska, 1949, and

leave such applications in the custody of plaintiff's officers; (b) for defendant's deputy to then call at the cannery office and issue licenses on the basis of such applications; and (c) for plaintiff to then remit to defendant by its own checks the license tax fees due from such fishermen.

4. In accordance with such practice, before the opening day of the fishing season in 1949, plaintiff's fishermen at its cannery at Naknek, Alaska, had signed such applications and had delivered them to plaintiff. Without payment of the license fees, plaintiff began its fishing operations there in 1949. Defendant's deputy visited this cannery on July 6, 1949, and requested from plaintiff payment of such license taxes, but payment was refused by plaintiff and the signed applications were not given to defendant's deputy. Thereupon the deputy tax collector warned plaintiff's officers and fishermen that they were subject to arrest and prosecution under the law, the former for employing unlicensed fishermen and the latter for not paying the tax. On the deputy's return to Naknek on July 16, 1949, the applications for each of the nonresident fishermen employed there by plaintiff were handed to such deputy by plaintiff, he made out and issued licenses for each fisherman, and plaintiff then gave to him its check covering the total amount of license taxes due from all of said fishermen.

5. At no time was any complaint lodged with any magistrate charging plaintiff or any of its officers with the violation of any of the provisions of Chapter 66, Session Laws of Alaska, 1949; at

no time did defendant or any of his deputies make any attempts to arrest any of plaintiff's officers or agents; and no threat to seize plaintiff's property or to invoke or to pursue any remedy for the collection of such tax from the person or property of plaintiff was ever made.

6. Of the $30,105.00 claimed by plaintiff, $21,500.00 represents instances where either the application or license of plaintiff's fishermen, or plaintiff's checks in payment of their license taxes, have stamped thereon the words "Paid Under Protest"; and $8,595.00, instances where none of such papers have on them any writing indicating that this amount was paid under protest.

7. No assignments of the claims for refund of such license tax fees were made by any of such fishermen to plaintiff.

From the foregoing findings of fact, the court makes the following:

Conclusions of Law

1. Until March 7, 1951, defendant's deputies were not empowered to make arrests for violations of the provisions of Chapter 66, Session Laws of Alaska, 1949.

2. Chapter 66, Session Laws of Alaska, 1949, did not require plaintiff to pay the tax imposed upon its fishermen employees; was not directed in terms or in practical operation against plaintiff; was not self-executing, as that term is used in the law of duress; and, therefore, did not compel plaintiff to make the payments for which it seeks recovery.

3. Requests made by defendants deputy of plaintiff to pay the license taxes of its fishermen employees were made pursuant to the established practice referred to above in Finding of Fact No. 3, and not from any notions, on the part of defendant or his deputies, of liability of plaintiff for such taxes; did not constitute a demand upon plaintiff to pay such taxes; and did not compel plaintiff to make the payments for which it seeks a refund.

4. The license taxes imposed under Chapter 66, Session Laws of Alaska, 1949, and paid to defendant by plaintiff for the years 1949, 1950 and 1951 for and on behalf of the nonresident fishermen employees of plaintiff were not paid under duress or coercion imposed by defendant or any of his agents or deputies.

5. Plaintiff is not the real party in interest within the meaning of Rule 17, Federal Rules of Civil Procedure—

(a) with respect to the license taxes paid by plaintiff by way of deductions from the wages of its fishermen employees, for plaintiff was the mere agent for the remission of such taxes and has no right to claim a refund of the same; and

(b) with respect to the taxes paid by plaintiff from its own funds under a provision in its employment contracts requiring it to do so, for the only effect of such contract provision was to augment the compensation of the fishermen, thus entitling them, and not plaintiff, to a refund of license taxes exacted under an invalid law.

6. Plaintiff is not entitled to recover, and the action should, therefore, be dismissed.

Order for Judgment

It is Hereby Ordered, that this action be dismissed and that defendant have judgment against plaintiff for his costs and disbursements incurred herein and for a reasonable attorney's fee.

Dated at Ketchikan, Alaska, this 26th day of November, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 26, 1952.

In the District Court for the Territory of Alaska, Division Number One at Juneau

Civil Cause No. 6621-A

PACIFIC AMERICAN FISHERIES, INC., a Corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Defendant.

JUDGMENT AND DECREE

This cause came on for trial before the court on September 23, 1952, on plaintiff's amended complaint and the answer and amendment thereto of defendant to plaintiff's amended complaint. Plain-

tiff was represented by H. L. Faulkner of Faulkner Banfield and Boochever of Juneau, Alaska; defendant was represented by J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General. Evidence was adduced before the court on behalf of plaintiff and defendant, arguments were made and briefs filed by counsel for plaintiff and defendant, and the cause was submitted for judgment on September 23, 1952. On November 10, 1952, the court rendered its written opinion, which was that day filed with the clerk of the court, and thereafter made and filed its findings of fact, conclusions of law and order for judgment.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed—

1. That this action be, and it hereby is dismissed; and

2. That defendant have judgment against plaintiff for defendant's costs and disbursements herein, to be hereinafter taxed and inserted herein by the clerk of the court, in the sum of $....., and for a reasonable attorney's fee to be allowed by the court and inserted herein in the sum of $.....

Done in Open Court this 26th day of November, 1952, at Ketchikan.

/s/ GEORGE W. FOLTA,
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 26, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

Comes Now the plaintiff, Pacific American Fisheries, Inc., a corporation, and submits to the court its objections to the findings of fact and conclusions of law submitted by defendant with his request, dated November 20, 1952, and to the proposed judgment and decree, submitted therewith, as follows:

1. Plaintiff objects to finding number 4 for the reason that it is not based upon facts adduced at the trial, as the facts show that at Naknek, Alaska, the nonresident fishermen in the employ of plaintiff refused to pay the tax or license fee, and that the deputy tax collector called them together and threatened to arrest them and have them put in jail for non-payment of the license fee, and he threatened to arrest the officers of the plaintiff and its representatives, and that it was upon the threats of arrest and the criminal penalties of the law and loss of property that plaintiff and its nonresident fishermen employees paid the license fees, and that they were paid because of the threats and penalties and loss of property and income to the fishermen and to plaintiff which would be the result of non-payment; and the fishermen authorized payment from their wages on the promise of the plaintiff that it would immediately bring suit attacking the validity of Chapter 66, Session Laws of

Alaska, 1949, and make every effort to recover back the license fees, all of which were paid under protest.

2. Plaintiff objects to finding number 5, because it is not in accord with the evidence and the facts. The evidence shows that the deputy tax collector had full power to institute criminal proceedings against the plaintiff and its nonresident fishermen in the Commissioner's Court at Naknek, and that he had already instituted such criminal proceedings against some nonresident fishermen in the employ of the Alaska Packers Association, and had warrants issued for their arrest, and the evidence further shows that threats of arrest were made by the deputy tax collector against the officers and representatives of the plaintiff.

3. Plaintiff objects to the conclusions of law number 1, wherein it is stated that the defendant's deputies were not empowered to make arrests for violations of the provisions of Chapter 66, Session Laws of Alaska, 1949, as being contrary to the facts, because the defendant's deputies were at all times empowered to make complaints before the U. S. Commissioner at Naknek, and other places, and cause warrants to be issued for both the officers and employees of the plaintiff and the nonresident fishermen in its employ.

4. Plaintiff objects to conclusion of law number 2, in which it is stated that the provisions of the law were not self-executing, for as a matter of fact the law itself imposed drastic criminal penalties on the

plaintiff for having in its employ nonresident fishermen who had not paid the tax levied under the provisions of Chapter 66, Session Laws of Alaska, 1949.

5. Plaintiff objects to conclusion of law number 3, as being misleading and not based upon the facts, and the law itself, and it objects to the conclusion that the defendant did not compel plaintiff to make payments for which it seeks a refund, for the evidence showed that plaintiff was compelled either to pay the tax itself, or submit to criminal prosecution, or suffer large property loss by reason of its failure to obtain a supply of fish for its canning operations.

6. Plaintiff objects to conclusion of law number 4, for the reason that it is contrary to the evidence and the facts of the case.

7. Plaintiff objects to conclusion of law number 5, as not being supported by the law and the rules of civil procedure, and especially to subdivision (b) of conclusion number 5, in which it is stated that with reference to the amount of the taxes paid by plaintiff from its own funds under a provision of its employment contracts with the men requiring it to do so, this amounted to additional compensation for the fishermen, which entitled them and not the plaintiff to a refund of license fees paid by the plaintiff from its own funds.

8. Plaintiff further objects to conclusion of law number 6, for the reason that it is not based upon the law and the facts.

9. Plaintiff further objects to the proposed judgment and decree submitted by defendant, for the reason that it is contrary to the law and the facts which were adduced in evidence and the facts which were admitted by defendant.

10. Plaintiff objects to the allowance of costs and disbursements to defendant, and particularly to the allowance of any sum as attorney's fees, for the reason that defendant has had the use of the various sums of money paid by plaintiff for from 18 months to three and a half years without interest.

Dated at Juneau, Alaska, this 24th day of November, 1952.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ H. L. FAULKNER,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 25, 1952.

[Title of District Court and Cause.]

MINUTES—FRIDAY, DECEMBER 19, 1952

With Robert Boochever in behalf of H. L. Faulkner, counsel for plaintiff, present, and with John Dimond present in behalf of defendant, oral arguments on exceptions to Findings of Fact and Conclusions of Law were waived. The court then overruled the exceptions to the Findings and Conclusions and further ruled that costs would not be allowed to either party. It was stipulated between counsel that

time for filing notice of appeal would commence running from this date, December 19, 1952, and that the court's decision in regard to the exceptions to the Findings and Conclusions would be considered to be the denial of a motion under Rule 52 (b) to amend or make additional findings of fact, the court agreed to this latter stipulation.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Pacific American Fisheries, Inc., a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and decree entered in this action on the 26th day of November, 1952, and from the whole thereof.

Dated at Juneau, Alaska, December 26, 1952.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Plaintiff.

I certify that a true and correct copy of the foregoing notice was mailed postage prepaid to J. Gerald Williams, Attorney General of Alaska, attorney for Defendant, this 26th day of December, 1952.

/s/ R. BOOCHEVER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed December 26, 1952.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Pacific American Fisheries, Inc., a corporation, the plaintiff hereinabove named, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, the above-named defendant, and his successors in office, for the benefit and indemnity of whom it may concern, in the penal sum of Five Hundred ($500.00) Dollars, to be paid M. P. Mullaney, the defendant above named, or his successors in office, for which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, by these presents.

Dated at Juneau, Alaska, January 19, 1953.

Whereas on November 26, 1952, in a suit pending in the District Court for the Territory of Alaska, First Judicial Division, between plaintiff and defendant above named, a judgment was rendered in favor of defendant and against plaintiff, dismissing plaintiff's complaint, and the plaintiff having filed notice of appeal to the United States Court of Appeals for the Ninth Circuit,

Now Therefore, the condition of this obligation is such that if plaintiff-appellant above named, and principal herein, shall prosecute the appeal to effect and answer all costs if the appeal be dismissed, or if it be affirmed by judgment of the appellate court

and pay all such costs as the appellate court may award if the judgment be modified, and shall pay the costs to the defendant, then this obligation to be void, otherwise to remain in full force and effect.

PACIFIC AMERICAN FISHERIES, INC.,
Principal.

By /s/ H. L. FAULKNER,
Its Attorney and Agent.

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY,
Surety.

By /s/ R. E. ROBERTSON,
Agent.

Approved as to form and surety this 19th day of January, 1953.

/s/ JOHN H. DIMOND,
Assistant Attorney General,
Attorney for Defendant.

[Endorsed]: Filed January 19, 1953.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANT, AND ASSIGNMENTS OF ERROR

The appellant, Pacific American Fisheries, Inc., a corporation, alleges that the Findings of Fact, Conclusions of Law and Judgment and Decree of the above-entitled court, entitled in this cause, and dated November 26, 1952, are erroneous and injurious to plaintiff; and plaintiff files herewith the following assignments of error on which it will rely, namely:

1. The Court erred in making and entering the Order of July 17, 1952, dismissing plaintiff's original complaint.

2. The Court erred in making and entering Finding of Fact No. 3 on November 26, 1952, relating to the "established practice" under the provisions of Chapter 66 of the Session Laws of Alaska, 1949, for the reason that the year 1949 was the first year Chapter 66 was in effect, and there could have been no "established practice" so far as it relates to Chapter 66.

3. The Court erred in omitting from Finding of Fact No. 4 the fact that the uncontroverted evidence showed the applications for nonresident fishermen's licenses given to defendant's deputy at Naknek on July 16, 1949, were given under protest and that the license fees paid there in July, 1949, were paid under protest and accepted under protest.

4. The Court erred in making and entering Finding of Fact No. 6, which reads as follows:

> "6. Of the $30,105.00 claimed by plaintiff, $21,500.00 represents instances where either the application or license of plaintiff's fishermen, or plaintiff's checks in payment of their license taxes, have stamped thereon the words "Paid Under Protest"; and $8,595.00, instances where none of such papers have on them any writing indicating that this amount was paid under protest."

for the reason that the uncontroverted testimony shows that all license fees involved were paid under protest and under duress and compulsion.

5. The Court erred in its Conclusion of Law No. 1, which reads as follows:

> "1. Until March 7, 1951, defendant's deputies were not empowered to make arrests for violations of the provisions of Chapter 66, Session Laws of Alaska, 1949."

for the reason that it is contrary to law, as the deputies were empowered to file complaints and cause arrests to be made for any violation of the provisions of Chapter 66, Session Laws of Alaska, 1949, and for the reason that the testimony of Deputy Thomas S. Parke shows that he had the power to cause arrests to be made and that he had exercised that power in several instances just prior to July 16, 1949.

6. The Court erred in making and entering Conclusion of Law No. 2, which reads as follows:

"2. Chapter 66, Session Laws of Alaska, 1949, did not require plaintiff to pay the tax imposed upon its fishermen employees; was not directed in terms or in practical operation against plaintiff; was not self-executing, as that term is used in the law of duress; and, therefore, did not compel plaintiff to make the payments for which it seeks recovery."

for the reason that while the law did not impose the license tax on the plaintiff, the practical operation of the law was to exact payment from plaintiff under duress if plaintiff's non-resident fishermen refused to pay the tax, and that the effect of the law was to compel the plaintiff to pay the license tax or fee on its non-resident fishermen.

7. The Court erred in making and entering Conclusion of Law No. 3, as the same is contrary to the law and the evidence.

8. The Court erred in making and entering Conclusion of Law No. 4, in which it is stated that the fees paid by plaintiff for and on behalf of the non-resident fishermen, employees of plaintiff, were not paid under duress or coercion imposed by defendant or any of his deputies.

9. The Court erred in making and entering Conclusion of Law No. 5, which reads as follows:

"5. Plaintiff is not the real party in interest within the meaning of Rule 17, Federal Rules of Civil Procedure—

(a) with respect to the license taxes paid by

plaintiff by way of deductions from the wages of its fishermen employees, for plaintiff was the mere agent for the remission of such taxes and has no right to claim a refund of the same; and

(b) with respect to the taxes paid by plaintiff from its own funds under a provision in its employment contracts requiring it to do so, for the only effect of such contract provision was to augment the compensation of the fishermen, thus entitling them, and not plaintiff, to a refund of license taxes exacted under an invalid law."

10. The Court erred in Conclusion of Law No. 6, in which it is held that plaintiff's action should be dismissed.

11. The Court erred in making and entering its Order for Judgment dated November 26, 1952, ordering the action to be dismissed.

12. The Court erred in making and entering Judgment and Decree herein, dated November 26, 1952, in which Judgment and Decree plaintiff's action is dismissed.

13. The Court erred in making and entering the Order of December 19, 1952, overruling plaintiff's objections to defendant's proposed Findings, Conclusions and Decree.

Wherefore, plaintiff prays that the Findings of Fact and Conclusions of Law and the Decree of the District Court of November 26, 1952, based thereon, be set aside and the cause reversed, and that judg-

ment be entered in favor of plaintiff for the amounts set forth in the amended complaint.

Dated at Juneau, Alaska, this 19th day of January, 1953.

FAULKNER, BANFIELD & BOOCHEVER.

By /s/ H. L. FAULKNER,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 19, 1953.

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated and agreed by and between Faulkner, Banfield & Boochever, attorneys for plaintiff above named, and John H. Dimond, Assistant Attorney General, attorney for defendant above named, that in printing the papers and records to be used in the hearing on appeal in the above-entitled cause before the United States Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers, except on the first page of the record, and that there shall be inserted in place of the title on all papers used as part of the record the words, "Title of District Court and Cause"; also that all endorsements on all papers used as a part of the record may be omitted, except the Clerk's filing marks and admission of service. It is further stipulated that all original exhibts be forwarded to the Clerk of the

U. S. Court of Appeals, but that plaintiff's Exhibits 1 and 6 and defendant's Exhibit B need not be printed.

Dated at Juneau, Alaska, this 19th day of January, 1953.

FAULKNER, BANFIELD & BOOCHEVER.

By /s/ H. L. FAULKNER,
Attorneys for Plaintiff.

/s/ JOHN H. DIMOND,
Assistant Attorney General, Attorney for Defendant M. P. Mullaney, Commissioner of Taxation.

[Endorsed]: Filed January 19, 1953.

In the United States Court of Appeals for the Ninth Circuit
No. 6621-A

PACIFIC AMERICAN FISHERIES, INC., a Corporation,

Appellant,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Comes now the appellant above named and adopts the Statement of Points to be Relied on by Appel-

lant filed with the Clerk of the District Court in this cause, as its Statement of Points to be Relied Upon in the United States Court of Appeals for the Ninth Circuit, and prays that the whole of the record, as filed and certified, be printed, with the exception of plaintiff's Exhibits 1 and 6 and defendant's Exhibit B.

Dated at Juneau, Alaska, this 19th day of January, 1953.

FAULKNER, BANFIELD & BOOCHEVER.

By /s/ H. L. FAULKNER,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 19, 1953. U.S.D.C.

[Title of District Court and Cause.]

ORDER

Upon motion of John H. Dimond, defendant's attorney, it is hereby

Ordered, that defenndant have leave to amend his answer by striking all of the Third Defense on Page 4 of defendant's answer and by substituting therefor the following:

Third Defense

All of the persons named in plaintiff's Exhibit "A," attached to the amended complaint,

are indispensable parties to this action and have not been made parties.

Done in open court at Juneau, Alaska, this 22nd day of September, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed in open court September 23, 1952.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD AND PROCEEDINGS TO BE INCLUDED IN THE RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above-entitled cause, and to include in the transcript of record the following described papers and records which the appellant, Pacific American Fisheries, Inc., a corporation, herewith designates as those portions of the record and proceedings herein which they deem should be contained in the record on appeal in this cause.

1. Plaintiff's Original Complaint.
2. Defendant's Motion to Dismiss Original Complaint.

3. Opinion on Defendant's Motion to Dismiss Complaint.

4. Order Dismissing Original Complaint.

5. Plaintiff's Amended Complaint, with Exhibit "A" attached.

6. Defendant's Answer.

7. Defendant's Amendment to Answer.

8. Plaintiff's Exhibit No. 1 (Photostats of checks).

9. Plaintiff's Exhibit No. 3, Bulletin of Tax Commissioner dated June 6, 1950.

10. Plaintiff's Exhibit No. 4, Certified Copy of Complaint in Intervention of Ned F. Andrich in Cause No. 6137-A.

11. Plaintiff's Exhibit No. 5, Certified Copy of Defendant's Answer to Andrich Complaint in Cause No. 6137-A.

12. Defendant's Exhibit A, Statement of Claim for Refunds.

13. Defendant's Exhibit B, Original License Applications.

14. Court's Opinion.

15. Findings of Fact and Conclusions of Law and Order for Judgment.

16. Judgment and Decree.

17. Plaintiff's Objections to Findings, Conclusions and Judgment.

18. Court's Minute Order dated December 19, 1952, Overruling Plaintiff's Objections to Findings and Decree, etc.

19. Notice of Appeal.

20. Reporter's Transcript of Record.

21. Bond on Appeal.

22. Statement of Points Relied on by Appellant.

23. Stipulation re Exhibits and Printing of Record.

24. Appellant's Statement of Points and Designation of Parts of Record to be Printed.

25. This Designation of Portions of Record and Proceedings to be Included in the Record on Appeal.

Dated at Juneau, Alaska, this 19th day of January, 1953.

FAULKNER, BANFIELD & BOOCHEVER.

By /s/ H. L. FAULKNER,
Attorneys for Plaintiff and Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 19, 1953.

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTION OF RECORD TO BE INCLUDED IN RECORD ON APPEAL

Defendant-appellee designates the following additional portion of the record to be included in the record on appeal:

1. Order dated September 23, 1952, granting defendant leave to amend his answer.

2. This designation of additional portion of record to be included in record on appeal.

Dated at Juneau, Alaska, this 22nd day of January, 1953.

/s/ JOHN H. DIMOND,
Attorney for Defendant-Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed January 22, 1953.

In the District Court for the Territory of Alaska, Division Number One, at Juneau

No. 6621-A

PACIFIC AMERICAN FISHERIES, INC., a Corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Defendant.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 23rd day of September, 1952, at 10:00 o'clock a.m. at Juneau, Alaska, the above-entitled cause came on for hearing before the Court without a jury, the Honorable George W. Folta, United States District Judge, presiding; the plaintiff appearing by H. L. Faulk-

ner, its attorney; the defendant appearing in person and by John H. Dimond, Assistant Attorney General of Alaska; and the following occurred:

The Court: You may proceed in this case.

Mr. Faulkner: If the Court please, I suppose it is not necessary for me to make a statement of what the suit is about. It is a suit to refund some nonresident fishermen's licenses under the provisions of Chapter 66 of the Session Laws of 1949. The amount in the complaint has been slightly changed by stipulation between Mr. Dimond and myself. We found [1*] that we had included there twenty-six nonresident fishermen for whom the license fees had already been refunded. That reduces the amount by $1170.00. We have made the appropriate changes all through the complaint, so that brings the amount claimed down to $30,105.00. Of that amount the company itself paid $20,610.00 and deducted from the pay of the men $9,495.00. There is no dispute regarding the amount. We don't need to go into that. We do want to introduce a little testimony. There are two points of law involved here. One is as to whether the amounts may be refunded, hinging on the question of whether it was paid under protest or duress. The other one is whether the company, admitting here that in certain cases they deducted the amount of the license fee from the pay of the men, is the real party in interest in this suit to recover. Those are the two questions of law.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: Are the parties agreed as to the issues?

Mr. Faulkner: As to the two questions of law. Well, Mr. Dimond contends that, since the Company—he has amended his answer—that, since the company was not the taxpayer, that is, the tax was not levied on the company, the payments made by the company may not be recovered by the company. So, that will be a question to be decided. And in that connection we have a stipulation here that shows the Court that in certain places, in certain areas, the amount involved was absorbed [2] and paid by the company under agreements with the men—those are union agreements. We have stipulated as to the contents of those agreements, which are quite voluminous, and that will avoid the necessity of introducing them. It may be that the first thing to do would be to read this stipulation.

"It is stipulated and agreed between plaintiff and defendant that the following provision is contained in the fishermens' union contracts entered into between the Alaska Salmon Industry, Inc., and the Alaska Fishermens' Union for the years 1948, 1949, 1950 and 1951 for salmon fishing for salmon canneries in Alaska in the districts known and designated as Western Alaska, Chignik, Kodiak, Cook Inlet and Southeast Alaska, to wit: 'Territorial fishing licenses when required, shall be paid by the Company for men covered by this Agreement who work exclusively for the Company.' and that this stipulation may be read in evidence and received upon the trial of the above-entitled cause in the

same manner and have the same force and effect as though the entire written contract for each of the years above mentioned had been introduced and received in evidence. Dated at Juneau, Alaska, September 12, 1952. H. L. Faulkner, Attorney for Plaintiff. John H. Dimond, Assistant Attorney General, Attorney for Defendant."

The Court: Now, as I take it, that requires the company to pay the tax just as though it were a part of the wages without any right to subsequent reversion. [3]

Mr. Faulkner: That is right.

The Court: Well, how does that become material here?

Mr. Faulkner: It only becomes material if we have to separate these amounts which they paid themselves from the amounts which they deducted from wages. That is the only materiality of that, your Honor.

The Court: Well, it just seems to me that it would simplify matters if, after it was shown what was deducted, then the remainder presumably would be what was paid. The procedure under which it was paid would seem to me to be immaterial, that is, a provision in the contract would be, it seems to me, immaterial. The question is whether they paid it, regardless of whether there was a provision in the contract or not.

Mr. Faulkner: You mean whether the company paid it?

The Court: Yes.

Mr. Faulkner: Well, we will do that. We have

the evidence here of that. I want to call the Court's attention to this stipulation. It refers to these contracts as being entered into between the Alaska Salmon Industry and the Union. We will show the Court that all of these men were members of the union, which was a party to that contract, and that the Pacific American Fisheries was a member of the Alaska Salmon Industry.

The Court: Well, couldn't that be agreed [4] upon, stipulated to?

Mr. Faulkner: I think so.

Mr. Dimond: Oh, yes.

The Court: I think that has been established in so many other cases.

Mr. Faulkner: It is stipulated that the men involved in this case were all members of the union, which was a party to the contract referred to in the stipulation, and that the Pacific American Fisheries is a member of the Alaska Salmon Company, Incorporated, and, therefore, a party to the contract.

The Court: Do you agree as to the issues?

Mr. Dimond: Well, there is one other issue, your Honor. In the third defense to the defendant's answer to the amended complaint the defendant alleged that the persons from whom the license fees were deducted were indispensable parties and had not been joined, and the defense that we raise is under Rule 12 H. I would like to amend that defense at this time to state that all persons, both those from whom the license fees were deducted and those for whom plaintiff paid the tax, are indis-

pensable parties. I don't think Mr. Faulkner has any objection.

Mr. Faulkner: No; no objection.

The Court: This was not passed on before, this particular question.

Mr. Dimond: No. [5]

Mr. Faulkner: I don't think so.

Mr. Dimond: No; that defense wasn't raised on the motion to dismiss. The basis of the motion to dismiss was that the plaintiff wasn't the real party in interest.

The Court: It may be so amended then.

Mr. Dimond: That is the only other issue, your Honor, in addition to the ones Mr. Faulkner mentioned.

The Court: Very well. You may proceed then.

Plaintiff's Case

Mr. Faulkner: Now, if the Court please, in order to simplify the matter I think the first issue to be raised would be the question of whether these fees were paid under protest and what the protest was, and for that purpose I would like to read first the deposition of Mr. Edwards.

The Court: I have read it, so that——

Mr. Faulkner: Well, that may be included as a part of the record?

The Court: Yes.

DEPOSITION OF R. E. EDWARDS

a witness on behalf of plaintiff (Direct Interrogatories and Answers thereto):

Q. 1. Please state your name.

(Deposition of R. E. Edwards.)

Q. 2. Where are you employed? [6]

A. 2. Pacific American Fisheries, Inc., 401 Harris Street, Bellingham, Washington.

Q. 3. Where were you employed in July, 1949, and by whom, and in what capacity?

A. 3. Naknek Cannery; Pacific American Fisheries, Inc.; bookkeeper.

Q. 4. If you have answered that you were employed during that period by Pacific American Fisheries, Inc., the plaintiff in the above-captioned case, please state whether you were so employed on July 6 and 7, 14, 15, 16 and 17, 1949?

A. 4. Yes.

Q. 5. Were you employed by Pacific American Fisheries, Inc., the plaintiff, during the years 1950 and 1951? A. 5. Yes.

Q. 6. Are you acquainted with Thomas S. Parke, Enforcement Officer and Special Deputy of the Department of Taxation, Territory of Alaska?

A. 6. Yes.

Q. 7. If your answer to the last question is in the affirmative, please state whether you saw Mr. Parke at the Naknek cannery of the plaintiff on July 6, 1949. A. 7. Yes.

Q. 8. If your answer to the last question is in the affirmative, please state what occurred during Mr. Parke's visit [7] to the Naknek cannery on July 6, 1949.

A. 8. Mr. Parke is Enforcement Officer and Special Deputy of the Department of Taxation for Alaska. He arrived at the Naknek Cannery at

(Deposition of R. E. Edwards.)

about 10:00 p.m. on July 6th, 1949. He came to the office and requested that the company pay the Alaska Nonresident Fishermen's License Fees of $50.00 each on all nonresident fishermen employed by the company as fishermen and crews of tenders. He said that all those men were being employed illegally under the Act, which would subject them and the company's representatives to arrest. I told him I would need to have authority from the Home Office in Bellingham before making any payments. Mr. Parke left early the next morning.

Q. 9. Did you see Mr. Parke again after July 6, 1949, and if so, where and under what circumstances?

A. 9. Mr. Parke came again to the Naknek Cannery on July 14th, 1949, but the fishermen, superintendent and bookkeeper were out on the fishing grounds, and Mr. Parke left during the morning hours.

Q. 10. Did Mr. Parke say anything to you in July, 1949, regarding the liability of the representatives of Pacific American Fisheries, Inc., to arrest for having in its employ or purchasing fish from nonresidents who had not paid the nonresident fishermen's tax levied under the provisions of Chapter 66, Session Laws of Alaska, 1949? [8]

A. 10. Yes.

Q. 11. Please state the substance of Mr. Parke's statement in this regard.

A. 11. He told me that he had authority under the Act to subject to arrest the representatives of

(Deposition of R. E. Edwards.)

the company for having nonresident fishermen and tender crews in the employ of the company unless the license fees were paid. He said he could tie up the pack of the cannery if we continued to fish illegally.

Q. 12. Please state what else occurred during Mr. Parke's subsequent visits to Naknek in the month of July, 1949, with reference to the collection of the nonresident fishermen's license fees from employees of the plaintiff, Pacific American Fisheries, Inc., and from fishermen from whom the plaintiff was purchasing fish at that time.

A. 12. On July 16th, 1949, Mr. Parke again arrived at the Naknek cannery of the plaintiff at 9:30 a.m. Mr. Tarrant, vice-president of the company, Mr. A. W. Nelson, superintendent, and I were there. Mr. Parke again demanded that the company pay the tax on nonresident fishermen or be subject to criminal prosecution. Mr. Parke held a meeting with the nonresident fishermen, without representation of the company, and I was told by the fishermen that Mr. Parke informed them they would be subject to arrest and prosecution if the license fees were not paid. The [9] fishermen agreed to have the company pay the fees for them "under protest" in order to avoid arrest and prosecution. The fishermen instructed me to make payments of license fees "under protest" by cannery check. It was the custom at all canneries in all years to make payment by company check on behalf of its fishermen to the Tax Collector.

(Deposition of R. E. Edwards.)

Q. 13. Please state what was done by the Company and by you and the officials of the Company with reference to the payment of the nonresident fishermen's license fees in 1949.

A. 13. The Company, by company check made payable to the Tax Commissioner, paid all the nonresident fishermen's license fees demanded. These were paid "under protest." One check, dated July 16th, 1949, is in the sum of $3,090.00, and one check, dated July 18th, 1949, is in the sum of $750.00. The one dated July 16th includes 60 nonresidents at $50.00 each and 18 residents at $5.00 each.

Q. 14. State whether these nonresident fishermen's license fees were paid by the plaintiff company in 1950 and 1951 under the same circumstances as they were paid in 1949.

A. 14. Yes, in 1950. In 1951 some canneries had received word from the home office to pay nonresident fishermen's fees at the $5.00 level only. [10]

Q. 15. State the method employed by the Tax Commissioner of Alaska and his deputies in making collection of nonresident fishermen's license fees each year from nonresident fishermen in the employ of salmon packing companies, as to whether collections are made by the Tax Collectors and deputies directly from the fishermen or through the company.

A. 15. For the convenience of the Tax Commissioner, all payments were made by company and by company checks. The company also handles all the paper work in connection with applications for licenses.

(Deposition of R. E. Edwards.)

Q. 16. Has this been the custom with reference to Pacific American Fisheries, Inc., the plaintiff herein, at its Naknek cannery, and other canneries where you have been employed?

A. 16. Yes, at all times.

Q. 17. Were all such collections made for non-resident fishermen's license fees in the same manner each year? A. 17. Yes, each year.

Q. 18. Please state the method employed with reference to the preparation and filing of applications and payment of tax and receipt of licenses at the Naknek cannery of the plaintiff and at other canneries where you have been employed.

A. 18. The license applications are made out at the cannery [11] office and transmitted to the Tax Commissioner or his deputy, with company check for the amount of the license fees; the license fees are not collected from the individual fishermen direct. This method saves much expense and time to the Tax Commissioner and it is employed for his convenience.

Q. 19. Until the arrival of Mr. Parke, Deputy Tax Collector, at Naknek cannery of plaintiff in July, 1949, had the non-resident fishermen in plaintiff's employ agreed to pay the non-resident fishermen's tax, or refused to pay it?

A. 19. The non-resident fishermen had refused to pay the tax. I was informed by the fishermen that this was on advice from their unions and attorneys.

Q. 20. Did the Pacific American Fisheries, Inc.,

(Deposition of R. E. Edwards.)

the plaintiff, or any one of the non-resident fishermen in its employ, or any non-resident fishermen from whom it purchased fish in the years 1949, 1950 and 1951 voluntarily and without protest pay any non-resident fishermen's tax to the defendant?

A. 20. No, to my knowledge they did not. And at the time the agreement was made with Mr. Parke for payment "under protest" it was agreed that all payments of the non-resident fishermen's license fees would be accepted as "under protest" and that the Pacific American Fisheries, [12] Inc., on its own behalf and on behalf of the men, should bring suit in court promptly to test the validity of the law under which the license fee was levied and imposed.

Q. 21. For what reason were the non-resident fishermen license fees paid by the plaintiff on its own behalf and on behalf of non-resident fishermen in its employ, and from whom it purchased fish at the places where you were employed in 1949, 1950, and 1951?

A. 21. In order to avoid arrest and criminal prosecution, and to enable us to continue packing fish.

(The signature of the witness and the certificate of the Notary Public appear on the original deposition on file in the case. As reflected in the Notary's certificate, the date of taking of the deposition was September 12, 1952.)

(Deposition concluded.)

MONRAD B. HANSEN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Hansen, will you state your name?

A. Monrad B. Hansen.

Q. Where do you live, Mr. Hansen?

A. Portland, Oregon. [13]

Q. What kind of work do you do?

A. I am a fisherman and a longshoreman.

Q. And how long have you been a fisherman?

A. Since 1927 included.

Q. Where do you fish? A. Bering Sea.

Q. For whom?

A. Pacific American Fisheries.

Q. Now, Mr. Hansen, are you a member of the Alaska Fishermen's Union? A. Yes.

Q. Which is a party to the contract we just referred to? A. That is right.

Q. How long have you been a member of that union? A. Since 1927.

Q. Now, in 1949 and '50, were all non-resident fishermen who fished in Alaska members of that union? A. Yes.

Q. And how are the union—how is the union business conducted at the canneries? Do you conduct it through the men themselves in a body or do you have a representative?

A. We have a representative.

Q. What is he called? A. A delegate.

(Testimony of Monrad B. Hansen.)

Q. And who was the delegate at Naknek—where were you fishing [14] in 1949?

A. Naknek Cannery.

Q. Of the Pacific American Fisheries?

A. Pacific American Fisheries.

Q. Who was the delegate of the union there at that time? A. John Storkersen.

Q. Were you at the cannery on July 16, 1949, when Mr. Parke, a deputy tax collector, was there?

A. Yes.

Q. Did you have a meeting with Mr. Parke?

A. Yes.

Q. Now, was that the non-resident fishermen?

A. All fishermen attended the meeting.

Q. Now, what day of the week was that?

A. The 16th proved to be on a Saturday.

Q. That was not a fishing day?

A. It was a fishing day up until six o'clock in the evening.

Q. And after that it was not; it was closed?

A. It was closed.

Q. Now, Mr. Hansen, how long was the fishing season at Naknek that year? How many fishing days were there under the regulations?

A. Well, I would say seventeen or eighteen days, whichever the case might be.

Q. Seventeen or eighteen days. Now, at this meeting you held with Mr. Parke, what did you discuss?

A. Mr. Parke was sent over from the office to explain to us that the licenses had been raised from

(Testimony of Monrad B. Hansen.)

twenty-five dollars to fifty, and of course the men didn't like it, and we had a meeting with him there, and a fellow brought up the question, in case we refused to pay it, what he would do, and he said we would all be put in jail.

Q. Now, prior to that time had you refused to pay the license? A. Yes.

Q. Had there been some instructions or communications of the union upon this license fee of fifty dollars? A. No.

Q. Had the union given any advice regarding the payment of it?

A. Not to my knowledge.

Q. But you hadn't paid it at that time?

A. No.

Q. How is this license fee ordinarily paid?

A. It is paid by the company, where each individual has to go to the company and sign on before they can deduct off of your wages.

Q. When is that usually done?

A. It is usually done before the fishing season starts.

Q. That year you hadn't done it, in '49?

A. No. [16]

Q. Now, Mr. Parke then told you that the fee of fifty dollars was due, and, if it wasn't paid, you say, that you would be put in jail?

A. That is right.

Q. Now, then what was decided by the fishermen there?

A. It was decided we would have to pay; in

(Testimony of Monrad B. Hansen.)

order to keep fishing, we would have to pay, and it was paid under protest.

Q. What other arrangements did you make?

A. We afterwards instructed our delegate to see the company about collecting this money back for us.

Q. And did the company agree to bring suit at that time?

A. I guess they did. I wouldn't know that.

Q. Did they agree that they would, that the company would, try to get this money back?

A. Yes.

Q. Now, have you discussed the matter with any of the other members, nonresident fishermen?

A. Yes.

Q. Since then? A. Yes.

Q. And what is the attitude now of the nonresident fishermen?

A. They are all looking forward to getting it back from the company and expect the company to collect it for us.

Q. Now, Mr. Hansen, you say Mr. Storkersen was the delegate there. He was a nonresident fisherman there. [17] A. That is right.

Q. In 1949? A. Yes.

Q. Now, do you know about his bringing a suit?

A. Yes.

Q. And do you know of your own knowledge that he got his money back? A. Yes.

Q. Got all of it back?

A. He got all of it back for the year of '49.

Mr. Faulkner: I think that is all.

(Testimony of Monrad B. Hansen.)

Cross-Examination

By Mr. Dimond:

Q. Mr. Hansen, are you a fisherman or tenderman? A. I am a fisherman.

Q. You are not a tenderman? A. No.

Q. This meeting that you spoke about on July 16th, do you remember how many men attended that meeting, approximately?

A. We usually try to get as many men together before a meeting is held as possible, and, as a rule, I would say ninety-nine per cent are there.

Q. Of all the fishermen?

A. Of all the fishermen. [18]

Q. Not just tendermen?

A. Not just tendermen. They can also attend if they wish to, but they usually don't attend those meetings.

Q. You stated that all the nonresidents were looking forward to having the company get their money back. How many nonresidents have you talked to about this matter?

A. Oh, I have talked to several of them. In fact, each one expects its own company, wherever they fished, to collect that money back for them. They didn't all fish for the Pacific American Fisheries, you know.

Mr. Dimond: That is all.

(Testimony of Monrad B. Hansen.)

Redirect Examination

By Mr. Faulkner:

Q. Just one other question, Mr. Hansen; I overlooked it. What position do you hold with the union now?

A. I am just a plain fisherman. This last summer I was a delegate up there myself, but that was just for the season.

Q. For the season?

A. It is for each season; that is right.

Mr. Faulkner: That is all.

(Witness excused.)

Mr. Faulkner: If the Court please, I want to introduce, I don't think I have to introduce it, but call the Court's attention to the pleadings in 6137-A, which was the injunction [19] suit, and I think that is proper, just call the Court's attention to another case pending in the same court. There are one or two of the documents in there that I will want to introduce after I have some other testimony.

The Court: Well, you are asking me to take judicial notice of some particulars in that case?

Mr. Faulkner: Yes; of the pleadings in that case.

The Court: Of the pleadings?

Mr. Faulkner: Yes.

KENNETH C. BAGLEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Bagley, will you state your name?

A. Kenneth C. Bagley.

Q. What do you do? What is your occupation?

A. I am chief accountant for Pacific American Fisheries.

Q. How long have you held that position?

A. Since 1950; late in 1950.

Q. And prior to that time what did you do?

A. I was assistant to the chief accountant.

Q. And before that?

A. I was accountant for Pacific American Fisheries.

Q. Are you familiar with the company's plants and its method [20] of operation? A. I am.

Q. And you are familiar with all of the accounts? A. Yes.

Q. And did you bring here with you all the original documents, journal entries and accounts and checks with reference to the payment of the nonresident fishermen's licenses in 1949, 1950 and 1951? A. Yes.

Q. Mr. Bagley, have you been employed at any of the plants? A. Yes.

Q. Where?

A. In 1940 I was at Petersburg Cannery; 1942

(Testimony of Kenneth C. Bagley.)

at Kasaan Cannery; 1943 at King Cove Cannery; and 1944 and 1945 at Alitak Cannery; and 1946 at Port Moller Cannery.

Q. Now, Mr. Bagley, we have alleged here that the company paid to the Tax Commissioner under the provisions of the nonresident fishermen's license law in 1949, 1950 and 1951, certain license fees totaling $30,105.00. Are you familiar with those payments? A. Yes.

Q. Do you have here with you the original checks by which the payment was made?

A. I do.

Q. Issued to whom? [21]

A. To Mr. Mullaney, Tax Commissioner.

Q. Now, have you made photostat copies of those checks? A. Yes, sir.

Mr. Faulkner: If the Court please, I think we have agreed that these photostats may be used rather than the original checks, which are in the box here attached to the journal.

Mr. Dimond: No objection.

The Court: They may be admitted.

Q. (By Mr. Faulkner): I will hand you a series of checks and accounts, Mr. Bagley, and ask if those are photostat copies—or what are they?

A. They are photostat copies of the original checks that were issued to the Territory and returned to us through our bank statement as canceled and paid.

Q. They have not only the check but the endorsement? A. That is right.

(Testimony of Kenneth C. Bagley.)

Q. Now, do those represent the amounts claimed in this case?

A. Not entirely; no. There are a few resident five-dollar licenses in these amounts.

Q. But they represent, that is, all of the non-resident fishermen's licenses are included in those checks, are they? A. That is right.

Q. And a few residents?

A. A few residents. [22]

Q. And in most instances those are marked on the checks?

A. In most instances they are marked on the checks; yes.

Mr. Faulkner: Now, we would offer those photostats in evidence. Mr. Dimond has seen them.

Mr. Dimond: No objection.

The Court: They may be admitted.

Mr. Faulkner: We might put them all in as one exhibit; is that all right?

The Court: I think so, unless you wish to put in testimony about some particular one of them which, I suppose, there isn't going to be any.

Mr. Faulkner: No.

The Court: They may be admitted as Plaintiff's Exhibit No. 1.

The Clerk: So marked.

Q. (By Mr. Faulkner): Now, Mr. Bagley, I want to ask you to explain briefly to the Court about the preparations for salmon packing and fishing each year by the company. What is done? Maybe to simplify the matter I might ask you,

(Testimony of Kenneth C. Bagley.)

does the company have to make preparations at each one of these places for fishing and canning?

A. Yes.

Q. And does that entail a considerable expenditure of money in advance of the fishing season?

A. Quite a huge sum. [23]

Q. How much would that be approximately?

A. Oh, I would say a million dollars or better.

Q. A million dollars or more? A. Yes.

Q. Mr. Tarrant's affidavit says a million and three hundred thousand dollars. Would that be correct? A. That is approximately correct; yes.

Q. Now, Mr. Hansen testified the fishing season at Naknek in 1949 was seventeen or eighteen days; is that correct?

A. I believe that seventeen days is correct.

Q. The actual fishing days. Now, in the beginning of the season—oh, I might ask you—the company itself pays and assumes the nonresident fishermen's licenses at certain places?

A. That is right.

Q. That stipulation covers everything except Bristol Bay; is that right?

A. That is right, with the exception of some independent fishermen in other districts.

Mr. Faulkner: Now, I might call the Court's attention to this. We have set up in the complaint a complete analysis of these payments by canneries and given the check number, the cannery, the year, the date paid and the amount, whether it was deducted or not, so that the Court can see at a glance

(Testimony of Kenneth C. Bagley.)

there in Exhibit A just how these payments stand, and [24] you will note that in some of the areas where the contract provides that the company pays the licenses for fishermen in their employ, you will note that in some of those instances there are payments credited to the men. I am asking Mr. Bagley the question now so to explain that those cases were independent fishermen not in the direct employ of the company at the time.

Q. (By Mr. Faulkner): Now, do those men all belong to the same union? A. Yes.

Q. Covered by the same contract? A. Yes.

Q. Now, Mr. Bagley, you were not at Naknek of course in 1949? A. No.

Q. Have you been there?

A. I spent a week at Naknek in 1946.

Q. In '46. What is the custom for the fishermen there on Saturday and Sunday closed periods; where do they go?

A. They come into the cannery.

Q. They come into the cannery on Saturday and Sunday. Now, in making these payments to the Tax Commissioner, the record here shows they were all made by company checks?

A. That is right.

Q. And did you have any—did the company to your knowledge have any understanding with the men as to testing this law, the validity of the law, and applying to recover [25] license fees, both those that were paid by the company and those that were paid by the men?

(Testimony of Kenneth C. Bagley.)

A. Well, we, at our home office in Bellingham, had no personal contact with the men in regard to that, but it was general knowledge in our office that that would be done.

Q. Did you have any instructions regarding procedure in that respect?

A. Well, we had verbal conversations with our assistant secretary-treasurer and a letter from our assistant secretary-treasurer instructing us to promptly upon receipt of the refunds get it back to the men as quickly as possible in the cases where they had stood the charges themselves.

Q. Do you have any written instructions on that point?

A. Yes; a letter from Mr. D. L. Fickel, who is the assistant secretary-treasurer of our company.

Q. And the man in charge of that?

A. Yes.

Q. Now, I will ask you if this is the letter you received from Mr. Fickel?

A. Yes, that is the letter.

Q. What is the date? A. March 6, 1952.

Mr. Faulkner: I want to offer this in evidence, but I would like Mr. Dimond to read it first. He may have [26] some objection.

Mr. Dimond: No objection.

Mr. Faulkner: We will offer this in evidence as Plaintiff's Exhibit No. 2.

The Clerk: The exhibit is so marked.

Mr. Faulkner: This is: "Subject: Claim for Refund on Non-Resident Fishermen's License Fee."

(Testimony of Kenneth C. Bagley.)

Dated "March 6, 1952." Pacific American Fisheries letterhead. "To Mr. K. C. Bagley. Mr. Faulkner's letter of March 5th, 1952, indicates that the court has held the $50.00 nonresident fishermen's license tax to be invalid, and that the fee for nonresidents and residents alike should be $5.00 each. You will please arrange to put in motion through Mr. Faulkner's office a claim for the refund of the $45.00 excess per license that we have paid during the years 1949, 1950 and 1951. Although we have discussed this phase before, I want to remind you that in some instances the licensee, by the very nature of the contract under which he was working, was required to pay the license and therefore you should be extremely careful in setting up your claim. In other words, prepare your claim in such manner that immediately upon receipt of the refund from the Department of Taxation of the Territory of Alaska, individual checks can be mailed directly to the employee who paid his own license fee through us. It may be that the Department of Taxation of the Territory of Alaska will wish [27] us to execute an agreement whereby we guarantee that if the refund is made directly to us, we will immediately pass it on to the one who had previously absorbed the cost; if this should be desirable, we of course would be agreeable to such procedure. In any event, you should make whatever arrangements are necessary in order to insure that the refund promptly reaches the fisherman if he originally absorbed the tax." Signed "D. L. Fickel."

(Testimony of Kenneth C. Bagley.)

Q. (By Mr. Faulkner): Now, Mr. Bagley, what was the procedure at these canneries in the collection of these nonresident fishermen's licenses? How did the Tax Commissioner proceed, and how did the company proceed?

A. The company proceeded to have all fishermen call at the cannery office where the bookkeeper and his assistant would make out the formal applications for license and compile a list, separating the nonresident from the resident, and forward the list and application and check in payment to the collector, sometimes direct to Mr. Mullaney's office and sometimes to the collector, depending on what district was affected. At some canneries the collector did not call, and at some canneries the collector did call.

Q. Now, the license applications then were made out at the canneries?

A. At the canneries. [28]

Q. And the licenses were handled how? Where were the licenses delivered when they were issued?

A. They were delivered to the cannery.

Q. And did you always get them during the fishing season? A. Not always; no.

Q. Sometimes after it was closed?

A. Sometimes afterwards.

Q. So long as the money was paid in, you were safe? A. That is right.

Q. Now, was that generally done, that license matter taken care of, at the beginning of the season?

A. At the beginning of the season; yes.

Q. And would it be sometimes that the company

(Testimony of Kenneth C. Bagley.)

would pay this money before there was any fish money earned? A. Oh, yes.

Q. The company advanced it, in other words?

A. Yes.

Q. And have you checked the complaint in this case and the list of nonresidents? A. Yes.

Q. And the names of canneries? A. Yes.

Q. With these checks? A. Yes.

Q. And is that correct? [29]

A. That is correct.

Mr. Faulkner: I think, your Honor, there is no dispute about that anyway. It is conceded.

Q. (By Mr. Faulkner): Now, have any suits been filed against the company to date by any of the men suing under this license? A. No.

Q. No demand has been made on the company yet? A. Not to my knowledge; no.

Q. And your understanding generally is that they are waiting for the company to get the money?

A. That is correct.

Mr. Faulkner: I think that is all.

Cross-Examination

By Mr. Dimond:

Q. Mr. Bagley, in the answer to Interrogatory No. 8 of Mr. Edwards' deposition it states in part that he told Mr. Parke that he would need to have authority from the home office in Bellingham before making any payments. Were you in Bellingham in July, 1949? A. Yes.

(Testimony of Kenneth C. Bagley.)

Q. Do you recall any instructions given to Mr. Edwards with respect to the payment or nonpayment of the fishermen's license tax? [30]

A. Not first hand. Mr. Fickle was handling the matter at that time.

Q. You don't know what the statement made by Mr. Edwards was or what those instructions were?

A. No.

Mr. Dimond: That is all.

Redirect Examination

By Mr. Faulkner:

Q. Oh, there is one other question that I overlooked asking you, Mr. Bagley. I think it is admitted. Mr. Bagley, did the company, the plaintiff in this case, receive any communications from the Tax Commissioner with reference to the payment of the nonresident license tax? A. Yes.

Q. I will hand you here a bulletin and ask you if the company received that? A. Yes.

Mr. Faulkner: And I might offer that in evidence. I think there is no objection to this.

Mr. Dimond: No objection.

The Court: It may be admitted.

Mr. Faulkner: I don't need to read this, do I, your Honor?

The Court: No, you don't. [31]

Mr. Faulkner: It is simply a letter addressed "To All Fish Buyers and Canners: For your convenience and future guidance we quote Section 5

(Testimony of Kenneth C. Bagley.)

of Chapter 66 pertaining to the licensing of fishermen in the Territory of Alaska." And then the section is quoted, and the portion of it regarding the illegality of fishing without a license is capitalized and underscored, and then the part providing for the penalties are underscored and capitalized. This is signed by the Tax Commissioner and dated June 6, 1950. That would be Plaintiff's Exhibit No. 3.

The Clerk: So marked.

PLAINTIFF'S EXHIBIT No. 3

(copy)

Department of Taxation—Territory of Alaska
Box 2751, Juneau, Alaska

June 6, 1950.

To All Fish Buyers and Canners:

Re: Chapter 66, SLA 1949—Fishing Licenses

Dear Sirs:

For your convenience and future guidance we quote Section 5 of Chapter 66 pertaining to the licensing of fishermen in the Territory of Alaska.

Chapter 66, SLA—Section 5

"It Shall Be Unlawful for Any Person, Association or Corporation, or Agent of Any Association or Corporation, to Have in His, Their, or Its Employ Any Fisherman, Who Is Not Duly Licensed Under This Act or to Purchase Fish From Any Fisherman Who Is Not So Licensed. Each

(Testimony of Kenneth C. Bagley.)

Buyer of the Fish Shall Keep a Record of Each Purchase Showing Name of Boat From Which the Catch Involved Is Taken, Amount Purchased, and the Names of All Persons Attached to the Boat, Who Participated In the Trip on Which the Fish or Shellfish Were Taken. Such Records May Be Kept on Forms Provided by the Tax Commissioner, But Must Be Kept in Any Event, and Each Person Charged With Keeping Such Records Must Report Same to the Tax Commissioner in Accordance With Rules and Regulations Promulgated by Him. Anyone Violating Any of the Provisions of This Section Shall Be Guilty of a Misdemeanor, and Upon Conviction, Punishable Under the Penalty Clause of This Act."

It is not the policy of the Department of Taxation to inconvenience anyone; however, the provisions of the Section pertaining to the purchasing of fish from fishermen must be complied with to avoid invoking the penalty clause of the Act.

Very truly yours,

M. P. MULLANEY,
Tax Commissioner;

By /s/ NORMAN E. SOMERS,
Chief Assistant.

NES:w

Received in evidence September 23, 1952.

(Witness excused.)

Mr. Faulkner: I want to call Mr. Mullaney for a question or two.

MATTHEW P. MULLANEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Mullaney, you are the Tax Commissioner of Alaska? A. Yes, sir.

Q. The defendant in this case?

A. Yes, sir.

Q. Have you checked with your records the amounts claimed by the plaintiff in this application for refund of [32] nonresident fishermen's licenses?

A. I have.

Q. And do you find the amounts claimed in the complaint the same as your records show?

A. That is correct.

Q. Now, so far as the names and amounts are concerned, that is correct? A. That is correct.

Q. Do you have any record, Mr. Mullaney, showing the portion that was paid by the company as distinguished from the portion where they deducted from the wages of the men?

A. We have some records that came in with a letter that was addressed to us; yes.

Q. And those check; I mean, there is no dispute about it? A. No dispute on that.

Q. And this bulletin we have introduced here

(Testimony of Matthew P. Mullaney.)

as Plaintiff's Exhibit No. 3, I will ask you if that was a bulletin sent out from your office?

A. That is a copy of it.

Q. That is a copy of it?

A. That is correct.

Q. Now, Mr. Mullaney, there is some—what position does Mr. Parke hold with your office?

A. Enforcement officer and special deputy.

Q. And he went to Naknek in 1949 to collect these licenses? [33] A. He did.

Q. Did he go to any other area except to Bristol Bay?

A. I don't know. He could answer that. He covered all the fishing areas.

Q. Now, these checks that were received, Plaintiff's Exhibit No. 1, they were all received from the Pacific American Fisheries?

A. That is correct.

Q. And the licenses were sent to them; is that right? A. That is correct.

Q. Now, in some of these checks, Mr. Mullaney, they are marked "Paid under protest" and in one or two or them, three or four perhaps, they are not marked that way? A. That is right.

Q. You have examined these checks?

A. I have.

Q. Now, I will call your attention to Naknek, the Naknek check, two checks, for $3,090.00 and $750.00; is that right; is that the amount?

A. I would have to look.

Q. I thought you had that in your mind. Maybe

(Testimony of Matthew P. Mullaney.)

I am wrong, but I have it right here. Yes, that is right, those two; there is one for seven hundred and fifty, those two right there, and one is for $3,090? A. Yes. [34]

Q. Now, those checks, one of them, the one for $3,090.00, dated July 16th, is not marked "Paid under protest," is that right?

A. I believe that is correct.

Q. But did you check up the actual applications from that cannery on that date to see how they were marked?

A. I believe so, yes. Yes, that was checked.

Q. The applications themselves were marked "Paid under protest," is that correct?

A. The application or the duplicate license was marked that way; that is correct.

Q. Now, sometimes the applications were marked "Paid under protest" and the check not?

A. That is correct.

Q. And sometimes the check was marked "Paid under protest" and the application was not?

A. That is right.

Q. And in issuing the licenses did you always follow the practice of marking on it whether it was under protest or not in accordance with the check or the application?

A. That was not generally done. However, in most instances we did it, but unfortunately the one that issued some of those licenses failed to mark them.

Q. Yes. In some of those cases where the check was actually marked "Paid under protest" the li-

(Testimony of Matthew P. Mullaney.)

censes were not? [35] A. That is correct.

Q. Like at Petersburg. I have them here for 1949. A. That is right.

Q. I think there is no dispute about that. Now, I might ask you about the check here for Alitak. Here is a check, Mr. Mullaney, the very first check in this series is Alitak, $4,405.00, and it is for 88 nonresident licenses and 1 resident license; that is correct? A. That is correct.

Q. And now, that check was not marked "Paid under protest"? A. That is correct.

Q. Now, that is one of the cases where you consider no protest was made? A. That is right.

Q. Well, now, Mr. Mullaney, I will call your attention to—wasn't it your understanding from the very beginning that these payments were being resisted and that the companies, plaintiff and the other companies, and the nonresident fishermen were contending that the law was not valid?

A. Oh, we had a little difficulty in trying to collect them; yes.

Q. Well, I mean, that was your general understanding all the way through, that they were resisting the payment of this tax?

A. In some instances they did, and some they did not. [36]

Q. Well, but they had litigation pending, didn't they? A. That is right.

Q. And challenged the validity of the law right away after the Naknek incident?

A. Yes, that is correct.

(Testimony of Matthew P. Mullaney.)

Q. Now, then, referring to Alitak, you are familiar with the case that was brought by plaintiff, to test the validity of this law, on August 4, 1949, where you were the defendant?

A. That is right.

Q. That went through the courts. Now, you understood then that the company was contesting the law for itself and the men?

A. Yes, I did.

Q. In that suit. Now, in that suit, Mr. Mullaney, do you remember Mr. Ned Andrich intervened, an individual fisherman? A. I don't recall.

Q. There were a number of intervenors. Well, I call your attention to a complaint in intervention which is in this file which the Court has here.

Mr. Faulkner: I suppose we should show that to the witness.

The Court: If he has no recollection of it.

Mr. Faulkner: The complaint in intervention, and the answer, of Ned F. Andrich; certified [37] copies.

The Court: Do you wish to ask merely whether he remembers it or——

Mr. Faulkner: No. I want to ask him some questions about it.

The Court: Then it better be shown to the witness.

Q. (By Mr. Faulkner): Now, I will show you the original complaint in intervention of Ned F. Andrich in cause No. 6137-A and ask you if you remember receiving that, had it served on you.

(Testimony of Matthew P. Mullaney.)

A. I remember it now, yes.

Q. Now, then, right over there is the answer to it. It should have a clip on it too. Do you see it? No, that isn't it. Let me see if I can find it. I put a clip on it there so we wouldn't waste time looking for it. I will hand it to you and ask you if that part of the file is your answer to the complaint of Ned Andrich in that case. That is the original file.

Mr. Dimond: If the Court please, I probably prepared it.

A. I don't see my name on it at all. My name isn't on it. I can't find out where I signed this.

Mr. Faulkner: Maybe counsel will admit that is the original complaint and answer.

The Court: What was the original question? I missed that because of talking to the clerk. Did you raise [38] some objection?

Mr. Dimond: No. If the answer weren't verified, your Honor, I probably prepared the answer and Mr. Mullaney hasn't seen it, so I can stipulate or agree this is the original.

Mr. Faulkner: Well, is it agreed that that is the original complaint and answer in that case; that is all?

Mr. Dimond: Yes, it is.

Mr. Faulkner: Now, if the Court please, I want to introduce those in evidence and I would then withdraw them so they could remain in the file and introduce these certified copies which I handed to the clerk.

(Testimony of Matthew P. Mullaney.)

Mr. Dimond: How are these material, Mr. Faulkner?

Mr. Faulkner: Well, they are material this way, that this check, Mr. Mullaney doesn't give us credit for paying this Alitak license under protest. It is forty-four hundred dollars. The complaint in intervention shows that Mr. Andrich, an employee of the company in Naknek, a nonresident fisherman, in August, 1949, intervened in the case to test the validity of the law. He alleged that he appeared for himself and all other nonresident fishermen in Alaska, all in the employ of the plaintiff, and all from whom they bought fish, and all other similarly situated, and that they were threatened with criminal prosecution if the tax were not paid, and those two allegations are admitted in the answer so —this was [39] on the question of protest—it was claimed that this particular check was not paid under protest. We want to show that the check wouldn't need to be marked under protest in view of all the circumstances and especially in view of the admission that this man was threatened if he didn't pay it. That is the reason for offering this complaint and answer in that case.

The Court: Do you still object?

Mr. Dimond: No objection. Just one question. Didn't these people withdraw from the suit?

Mr. Faulkner: No, not Andrich. He never withdrew.

Mr. Dimond: No objection.

The Court: It may be admitted.

(Testimony of Matthew P. Mullaney.)

Mr. Faulkner: The Nakat Company and the Todd Company and Libby, McNeil & Libby withdrew from that suit. No one else that I know of.

The Clerk: The copy of the complaint will be Exhibit 4 and the answer Exhibit 5.

PLAINTIFF'S EXHIBIT No. 4

District Court for the Territory of Alaska
Division Number One at Juneau
Civil Action File No. 6137-A

PACIFIC AMERICAN FISHERIES, INC.,
Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Defendant.

THE NAKAT PACKING CORPORATION, a Corporation, et al.,
Plaintiffs in Intervention,

NED F. ANDRICH,
Plaintiff in Intervention,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Defendant.

COMPLAINT IN INTERVENTION OF NED F. ANDRICH

The above-named Ned F. Andrich, plaintiff in intervention, for himself and all other nonresident fishermen similarly situated, alleges:

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

1. That this plaintiff in intervention is a resident of Anacortes, State of Washington, and he is a purse seiner employed by the plaintiff hereinabove named in the operation of a purse seine boat in the waters of Southeastern Alaska engaged in fishing for salmon for the plaintiff, and he brings this action for himself and as representative of and on behalf of all the 400 nonresident fishermen in the employ of the plaintiff and from whom plaintiff purchases fish, and also on behalf of all other persons similarly situated, and this action is brought pursuant to the laws of the Territory of Alaska and under Rule 23 of the Rules of Civil Procedure, and the right sought to be enforced by the plaintiff in intervention for himself and on behalf of the class represented is several, and the object of the action is the adjudication of claims which are identical, and it is several in the further sense that there are common questions of law and fact affecting the several rights of this intervening plaintiff and all others represented, and a common relief is sought.

2. This intervening plaintiff, for himself and all others of the class represented, incorporates herein with like effect, as though fully set forth at length, all of the allegations contained in paragraphs 1 to 12, inclusive of the Complaint of plaintiff in this action, and reference is made thereto and they are herein alleged. (Rule 10, Rules of Civil Procedure.)

3. That the defendant and his deputies and

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

agents have demanded from this intervening plaintiff and all others similarly situated who are represented herein, and who are in the employ of the plaintiff, payment of the fifty dollar tax levied on nonresidents who are fishermen, by the provisions of Chapter 66, Session Laws of Alaska, 1949, and on each nonresident employed in plaintiff's fishing operations who is defined as a fisherman under the provisions of Chapter 66, and on the plaintiff in intervention and each one of the class represented herein, and the defendant and his deputies and agents have threatened plaintiff with criminal prosecution and with arrest and severe penalties unless this intervening plaintiff and all members of the class represented herein pay to the defendant the tax of fifty dollars imposed on nonresident fishermen as defined in Chapter 66.

4. That the facts set forth in the affidavits of S. G. Tarrant, filed with the original Complaint herein and dated August 3 and August 9, 1949, are true and are correct, and the statements therein made are adopted by this intervening plaintiff for himself and all others similarly situated by reference, as though fully set forth herein.

5. That the Territory of Alaska is insolvent and unable to meet its obligations, and if the tax is paid by this intervening plaintiff and others represented herein, even though under protest, there is no means of obtaining refund in case the Court holds the tax

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

to be invalid, and plaintiff in intervention has no adequate, speedy or plain remedy at law, and compliance with the demands of defendant for the payment of the tax from this plaintiff in intervention and all others whom he represents and who are similarly situated will require the payment of a large sum of money which cannot be recovered, and that defiance to the law will carry with it the risk of heavy fines and long imprisonment and that withdrawal from further fishing in the waters of Alaska until a test case can be taken through the courts will result in a great loss of business to the plaintiff in intervention and to all others similarly situated whom he represents, for which no compensation can be obtained, and that there is no plain, speedy or adequate remedy for the irreparable injury which will thus be suffered by the plaintiff in intervention and those whom he represents.

6. That this intervening plaintiff and all others similarly situated are willing to pay the tax imposed by the provisions of Chapter 66 in case its provisions should be upheld by the Court, and in order to secure payment of the tax to the Territory in that event, the plaintiff has filed a bond herein in the sum of $16,000.00, which bond is sufficient to secure to the defendant the payment of the entire tax imposed by the provisions of Chapter 66 on this plaintiff in intervention and all others represented herein, as more fully set forth in the Complaint, and the bond was filed in this suit for that purpose,

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

so that pending a hearing on the merits, the defendant is already protected fully by the bond.

7. That unless restrained by this Court, and enjoined, the defendant under the provisions of Chapter 66 will proceed with the arrest of all the nonresident fishermen referred to herein and disrupt their fishing operations and necessitate a multiplicity of suits, and the relief sought herein is necessary to avoid that result.

Wherefore, this intervening plaintiff prays:

1. That he may be permitted to intervene herein on his own behalf and on behalf of all others similarly situated, and that his Complaint in Intervention be filed.

2. That process issue against the defendant to answer this Complaint in Intervention (but not under oath or affirmation, the benefit of which is hereby waived by intervenor.)

3. That pending a hearing on intervenor's application for a preliminary injunction, the Court issue herein a temporary restraining order restraining the defendant and his agents and deputies from doing any act or thing for the purpose of enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, which apply to nonresident fishermen, as therein defined, or for the purpose of collecting from these intervenors any part of the tax levied on nonresident fishermen or from interfering with the operations of nonresident fishermen who decline to pay the tax for the reasons aforesaid.

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

4. That after notice and hearing, this Court grant to intervenor a preliminary injunction restraining defendant and his agents and deputies from doing any act or thing for the purpose of enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, which apply to nonresident fishermen, as therein defined, or for the purpose of collecting from intervenors any part of the tax levied on nonresident fishermen or from interfering with the operations of nonresident fishermen.

5. That upon final hearing, this Court enter a final order and decree to the same effect.

6. That upon the final hearing, the Court enter an order adjudging and decreeing that Chapter 66 of the Session Laws of Alaska, 1949, is null and void and of no legal force or effect as it applies to nonresident fishermen, as therein defined, who are engaged in the salmon fishing industry in Alaska.

7. That the Court grant such other relief as may seem meet in the premises.

NED F. ANDRICH,
Plaintiff in Intervention.

By /s/ H. L. FAULKNER,
His Agent and Attorney.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ H. L. FAULKNER.
Attorneys for Intervenor.

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

United States of America,
Territory of Alaska—ss.

I, H. L. Faulkner, being first duly sworn on oath, depose and say:

That I am agent and attorney for the intervening plaintiff hereinabove named, that I make this affidavit for and on his behalf; that he is presently on the fishing grounds in Southeastern Alaska more than 100 miles distant from Juneau and not at the place where the verification is required to be made; that I am familiar with all the facts alleged in the Complaint in Intervention and that they are true and correct.

/s/ H. L. FAULKNER.

Subscribed and sworn to before me this 15th day of August, 1949.

/s/ S. P. FREEMAN,
Notary Public for Alaska.

My commission expires April 26, 1953.

Receipt of copy of the Complaint in Intervention is acknowledged by plaintiff and plaintiff consents to the filing thereof and to the allegations with reference to the application of the provisions of the bond filed by it to this plaintiff in intervention and all others similarly situated as the bond was in fact

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

filed for the purpose of securing the payment of the tax due from them.

Dated at Juneau, Alaska, August 15, 1949.

PACIFIC AMERICAN
FISHERIES, INC.,

By /s/ H. L. FAULKNER,
Its Attorney in Fact.

I certify that the foregoing is a true and correct copy of the original Complaint in Intervention of Ned F. Andrich, intervening plaintiff.

/s/ H. L. FAULKNER,
Attorney for Intervening
Plaintiff.

United States of America,
Territory of Alaska,
First Division—ss.

I, J. W. Leivers, Clerk of the District Court in and for the First Division, Territory of Alaska, do hereby certify that the hereto attached is a full, true and correct copy of the original Complaint in Intervention of Ned F. Andrich, cause #6137-A, entitled Pacific American Fisheries, Inc., vs. M. P. Mullaney, et al., now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the afore-

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

said Court at Juneau, Alaska, this 23rd day of September, A. D. 1952.

J. W. LEIVERS,
Clerk.

By /s/ IRENE R. ERICKSON,
Deputy Clerk.

Received in evidence September 23, 1952.

PLAINTIFF'S EXHIBIT No. 5

In the District Court for the Territory of Alaska,
Division Number One at Juneau
No. 6137-A

PACIFIC AMERICAN FISHERIES, INC., a Corporation,

Plaintiff,

THE NAKAT PACKING CORPORATION, a Corporation, Plaintiff in Intervention, and Other Intervenors,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Defendant.

ANSWER TO COMPLAINT IN INTERVENTION OF NED F. ANDRICH, INTERVENOR

Comes now defendant above named and in answer to the Complaint in Intervention of Ned F. Andrich on file herein, admits, denies and alleges as follows:

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 5—(Continued)

1. Admits the allegations contained in Paragraph I of the Complaint in Intervention.

2. Referring to Paragraph 2 of intervenor's Complaint in Intervention, defendant incorporates herein, with like effect as though fully set forth at length, all of the matters contained in his Answer to the allegations contained in Paragraphs I to XII, inclusive, of the Complaint of plaintiff in this action, which Answer is on file herein.

3. Admits the allegations contained in Paragraph 3 of the Complaint in Intervention.

4. Referring to Paragraph 5 of the Complaint in Intervention, admits that defiance to the law will carry with it the risk of heavy fines and imprisonment. Denies each and every other material allegation contained therein.

5. Referring to Paragraph 6 of the Complaint in Intervention, defendant admits the allegation that plaintiff has filed a bond herein in the sum of $16,000.00; but denies each and every other material allegation of said Paragraph 6.

6. Denies the allegations contained in Paragraph 7 of the Complaint in Intervention.

Wherefore, defendant having fully answered the Complaint in Intervention filed herein by intervenor, prays that the Intervenor take naught by reason

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 5—(Continued)

thereof and that the same be dismissed with prejudice.

J. GERALD WILLIAMS,
Attorney General of Alaska.

JOHN H. DIMOND,
Assistant Attorney General, Attorneys for M. P. Mullaney, Commissioner of Taxation, Defendant.

I certify that the above and foregoing is a full, true and correct copy of the original Answer in the above-entitled cause.

/s/ JOHN H. DIMOND,
Attorney for Defendant.

Filed in the District Court, Territory of Alaska, 1st Division, at Juneau, August 24, '49, A.M.

J. W. LEIVERS,
Clerk;

By /s/ LOIS P. ESTEPP,
Deputy.

United States of America,
Territory of Alaska,
First Division—ss.

I, J. W. Leivers, Clerk of the District Court in and for the First Division, Territory of Alaska, do hereby certify that the hereto attached is a full,

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 5—(Continued)

true and correct copy of the original Answer to Complaint in Intervention of Ned F. Andrich, Intervenor, in cause #6137-A, entitled Pacific American Fisheries, Inc., vs. The Nakat Packing Company, et al., now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Juneau, Alaska, this 23rd day of September, A.D. 1952.

[Seal] J. W. LEIVERS,
Clerk;

By /s/ IRENE R. ERICKSON,
Deputy Clerk.

Admitted in evidence September 23, 1952.

Q. (By Mr. Faulkner): Now, Mr. Mullaney, I just want to ask you one more question and that is, in making payment, you haven't made payment of any of these nonresident license fees, any refund of any of these nonresident fishermen's fees yet?

A. Which ones are you speaking of?

Q. I say, any of those involved in the complaint?

A. None; no. [40]

Q. Except—well, the Neva we took out.

A. Well, that has been adjusted as amended; that has been amended, so we are basing it on the amended.

(Testimony of Matthew P. Mullaney.)

Q. Now, Mr. Storkersen brought a suit to test the validity of this law; you remember that?

A. I do.

Q. And he got his fee back?

A. That is right.

Q. And that was paid how?

A. By warrant.

Q. Do you remember to whom the warrant was made payable?

A. I can't recall exactly whether it was to Mr. Storkersen or to you.

Q. It was to me.

A. I can't recall; but it was paid.

Mr. Faulkner: I think that is all.

Mr. Dimond: If the Court please, I have no cross-examination but I have one or two questions to ask Mr. Mullaney on my own case. If counsel has no other witnesses, I can ask them out of order.

The Court: Do you have any other witnesses?

Mr. Faulkner: I don't believe so, your Honor—if I might have a minute. There are one or two things I want to introduce for the Court's convenience. I may do it while Mr. Mullaney is on the stand. I am going to offer for the Court's [41] convenience a list of the names of nonresident fishermen, listed on Exhibit A, for whom the tax was deducted, and this is simply for the Court's convenience—they are all set up in the complaint—so you wouldn't have to go through that exhibit, and I gave a copy of this to Mr. Dimond. Do you have any objection?

Mr. Dimond: No objection.

Mr. Faulkner: I just introduce it.

The Clerk: Exhibit No. 6.

Mr. Faulkner: I think that is all.

Defendant's Case

MATTHEW P. MULLANEY

called as a witness on his own behalf, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Dimond:

Q. Mr. Mullaney, I hand you this paper and ask you to state to the Court what it is.

A. A statement covering the claim for refund of nonresident fishing licenses paid for at fifty dollars each on which forty-five dollars each is claimed for refund.

Q. Did you prepare that statement?

A. I did.

Q. From the records of your office?

A. I did. [42]

Q. Plaintiff's Exhibit A attached to his complaint? A. That is correct.

Mr. Dimond: If the Court please, I would like to introduce this in evidence chiefly to show the breakdown at the time the check was received, how much of it was resident and how much nonresident, how much was paid under protest and how much was not paid under protest. It should facilitate

(Testimony of Matthew P. Mullaney.)

matters, help the Court in determining the final issues in this case, if there is no objection.

Mr. Faulkner: If the Court please, I don't think we have any objection to this. I do want to state this, that it is based on a theory different from our theory of the case, that is, this exhibit that Mr. Dimond just speaks of lists those items as paid under protest where the checks are so marked and that is the reason I introduced the Andrich pleadings to show that in that particular case, involving $3,960.00, in that particular case, why, they brought a suit to protest it, everybody, and, as far as the figures are concerned and Mr. Dimond's intention. we have no objection to that.

Mr. Dimond: Well, we indicated that there is no statement on the check or verification. It is a matter of law.

Mr. Faulkner: Yes; that is a question of law. We have no objection to putting it in.

The Court: Well, it may be admitted.

Mr. Faulkner: I think the figures do not [43] differ from our total figures.

The Clerk: That will be Exhibit A.

DEFENDANT'S EXHIBIT A

Department of Taxation—Territory of Alaska
Office of the Tax Commissioner

Re: Pacific American Fisheries, Inc., Claim for Refund of Non-Resident Fishing Licenses Paid for at $50.00 Each on Which $45.00 Each Is Claimed for Refund

Name of Cannery	Plaintiff's Reference	Draft No.	Draft Date	Amount	Distribution Resident	Distribution Non-Resident	Refund Claimed Non-Resident	Refund Claimed Amount	Amount Protested	Amount No Protest
Alitak Cannery	Exhibit "A" Page 1-3	41732	8-30-49	$ 4,405.00	$ 5.00	$ 4,400.00	88 x $45.00	$ 3,960.00	.....	$3,960.00
Alitak Cannery	Exhibit "A" Page 3-4	44087	6-24-50	5,100.00	.....	5,100.00	102 x 45.00	4,590.00	$ 4,590.00	.....
Kasaan Cannery	Exhibit "A" Page 5	104	9- 4-49	1,610.00	60.00	1,550.00	31 x 45.00	1,395.00	1,395.00	.....
Kasaan Cannery	Exhibit "A" Page 5-6	136	9- 3-50	2,100.00	100.00	2,000.00	40 x 45.00	1,800.00	1,800.00	.....
King Cove Cannery	Exhibit "A" Page 6	45433	9- 2-49	2,015.00	315.00	1,700.00	34 x 45.00	1,530.00	.....	1,530.00
King Cove Cannery	Exhibit "A" Page 7-8	48379	7-17-50	4,300.00	50.00	4,250.00	85 x 45.00	3,825.00	3,825.00	.....
Naknek Cannery	Exhibit "A" Page 8	45776	7-18-49	750.00	.....	750.00	15 x 45.00	675.00	675.00	.....
Naknek Cannery	Exhibit "A" Page 8-9	45774	7-16-49	3,090.00	90.00	3,000.00	59 x 45.00	2,655.00	2,655.00	.....
Nushagak Cannery	Exhibit "A" Page 10	46842	9-26-49	400.00	.....	400.00	8 x 45.00	360.00	360.00	.....
Nushagak Cannery	Exhibit "A" Page 10	49352	7- 9-50	600.00	.....	600.00	12 x 45.00	540.00	540.00	.....
Petersburg Cannery	Exhibit "A" Page 10	47318	9-19-49	945.00	45.00	900.00	18 x 45.00	810.00	810.00	.....
Petersburg Cannery	Exhibit "A" Page 10-11	50048	8-14-50	1,450.00	.....	1,450.00	29 x 45.00	1,305.00	1,305.00	.....
Petersburg Cannery	Exhibit "A" Page 11	7911	8-24-50	60.00	10.00	50.00	1 x 45.00	45.00	.....	45.00
Port Moller Cannery	Exhibit "A" Page 11	47525	9-13-49	950.00	.....	950.00	19 x 45.00	855.00	855.00	.....
Port Moller Cannery	Exhibit "A" Page 11-12	50603	9-27-50	1,045.00	95.00	950.00	19 x 45.00	855.00	.....	855.00
Shumagin Cannery	Exhibit "A" Page 12	48893	9- 2-49	2,585.00	135.00	2,450.00	49 x 45.00	2,205.00	.....	2,205.00
Shumagin Cannery	Exhibit "A" Page 12-13	50830	7-15-50	950.00	.....	950.00	19 x 45.00	855.00	855.00	.....
Floater No. 1	Exhibit "A" Page 13	51782	7-19-50	1,750.00	.....	1,750.00	9 x 45.00	405.00	405.00	.....
Floater No. 1	Exhibit "A" Page 13-14	51302	6-26-51	800.00	.....	800.00	16 x 45.00	720.00	720.00	.....
Excursion Inlet	Exhibit "A" Page 14	50057	8-17-50	800.00	.....	800.00	16 x 45.00	720.00	720.00	.....
			Totals	$35,705.00	$905.00	$34,800.00	669 x $45.00	$30,105.00	$21,510.00	$8,595.00

(See Footnote)

Footnote: Explanation of Amounts Shown Under the Caption "Protested" and "No Protest"
Protested—Either the Application, Duplicate License, Draft or all three documents show, "Paid Under Protest"
No Protest—No evidence of being "Paid Under Protest" appears on the Application, Duplicate License or Draft.

Received in evidence September 23, 1952.

(Testimony of Matthew P. Mullaney.)

Mr. Dimond: That is all. Is that all you have, Mr. Faulkner?

Mr. Faulkner: I think so. Do you have any more? Pardon me; one other question. I think it is agreed on.

Cross-Examination

By Mr. Faulkner:

Q. Mr. Mullaney, before this suit was brought was there an application made to you for a refund of the license fees involved in this suit?

A. Yes.

Q. Do you have that here? A. Yes.

Q. Could I see that?

Mr. Faulkner: I don't know; maybe we can shorten this if counsel will admit that.

The Court: I think that is something that can be agreed on.

Mr. Dimond: Yes.

Mr. Faulkner: Then it is admitted before bringing suit that plaintiff made application to the defendant for the refund or return of the license fees involved in this case.

(Witness excused.) [44]

THOMAS S. PARKE

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dimond:

Q. Will you please state your name, residence and occupation?

(Testimony of Thomas S. Parke.)

A. Thomas S. Parke. I am enforcement officer and special deputy for the Department of Taxation.

Q. You live in Juneau, Alaska?

A. Juneau Alaska.

Q. How long have you been tax collector and special enforcement officer?

A. Since the Department of Taxation, since 1946, and I have had different titles, but it has amounted to about the same procedure as enforcement officer.

Q. Were you at the Naknek Cannery of plaintiff on July 6, 1949? A. Yes.

Q. Will you please state what you did there with respect to the collection of the nonresident fishing license tax from the fishermen employed at that cannery on that date?

A. At that time I called at the cannery and asked, the usual procedure of receiving their applications and issuing the licenses and receiving the check for it and going on about my business, but at the time, why, I was given to understand and told that they couldn't turn over applications [45] for nonresident fishermen they were holding, that they had orders from the head office not to turn over the applications as they weren't to pay them and couldn't pay them without authority from the head office in Bellingham.

Q. Mr. Parke, did you make any threats to any officers of the company at that time?

A. No. I talked to Mr. Nelson, the superintendent, and the bookkeeper in regards to the law, quoted the law, and told them what my instructions were

(Testimony of Thomas S. Parke.)

from Juneau and that something would have to be done as far as issuing these licenses, and they said that I would just have to wait until they could find out what could be done from their head office in Bellingham.

Q. You left the cannery then and went elsewhere? A. Yes, I did.

Q. When did you return, if you returned?

A. On July 14th.

Q. And what did you do on that day with respect to collecting these taxes?

A. In fact I didn't do much of anything. I called at the cannery and, as I understand that, they were having difficulties over a drowned man or something down the river, and the superintendent and everybody concerned that had any authority were away, so I stayed for an hour or two and then left and walked back to Alaska Packers Cannery, [46] and in the meantime I talked to Mr. Edwards, who was there at the time, and he said there was nothing could be done yet as far as he was concerned, things were in order, but he couldn't turn over any records.

Q. Mr. Parke, you did state though either to Mr. Edwards or to some other official there that they would be subject to arrest if they continued to employ unlicensed fishermen?

A. I told them that my duty there was to collect it and something would have to be done. I quoted the law and, that part of the law, in fact to the best of my knowledge I left them a copy of the law showing where they were liable for the licenses and

(Testimony of Thomas S. Parke.)

that the canneries would be liable if they had in their employ men that were unlicensed. As I understood it, they were unlicensed and the fishermen had no licenses and that none would be issued.

Q. Did you return to Naknek again after July 14th? A. Yes, I did. I was there on the 16th.

Q. What happened then with respect to the collection of this tax?

A. At that time I collected the tax. At that time, why, it had been understood at other canneries where we had taken some action, and they agreed to pay under protest, so I went back to the Naknek Cannery, and they had a meeting with the fishermen, and I understood that some tender crew men were there also, and they agreed to pay it under [47] protest and go about their business of fishing.

Q. Did they hand you the applications already signed by the fishermen? Were they handed to you by the officials of the cannery?

A. The officials of the cannery gave me the applications, and I issued them before I left the cannery.

Q. Do you know when those applications were signed by the men?

A. We have it on the applications.

Q. Will you produce the applications and state what the applications show in respect to the fishermen at Naknek and the date of the signatures on the applications?

A. The tender men signed after, on July 18th; and the fishermen were signed on the 24th of June, 1949.

(Testimony of Thomas S. Parke.)

Q. The date, the 24th of June, shows on the applications?

A. On the applications, yes. I believe it is all identical.

Q. How many fishermen are there and how many tender men at Naknek in 1949, according to this list of applications you have?

A. I believe, according to the records, fifty-nine fishermen and fifteen tender men, and Storkersen is the next one.

Q. Did you check all the names on those applications against the names of the persons listed in Plaintiff's Exhibit A under the two Naknek headings? A. Yes, I did, sir. [48]

Q. And do those names correspond to the names listed in Plaintiff's Exhibit?

A. Yes, they do.

Mr. Dimond: I would like to introduce these original applications in evidence, your Honor, for this purpose. The plaintiff claims that the tax was collected by reason of duress on either July 6th, 14th or 16th, and yet these applications on their face show that they were signed by the men on June 24th, consequently I think it is material to show that the men were agreeable to paying the tax long before Mr. Parke arrived there.

Mr. Faulkner: We have no objection to that, if the Court please. I think that is the wrong interpretation to put on it. The men come up here and go out on the fishing grounds. You have to get their license applications signed before they go, as Mr.

(Testimony of Thomas S. Parke.)

Bagley said. That is done in advance, and the fact of withholding them and not turning them in and not paying them indicates that they didn't intend to pay them. All the evidence shows that they didn't intend to pay them, but they had them on hand, and furthermore they did owe five dollars and would have to pay that. I have no objection but——

The Court: Well, it may be that they would not have much weight, at least from your viewpoint, but I think the objection would merely go to the weight, and they may be admitted. [49]

Mr. Dimond: Well, I have one other question.

Q. (By Mr. Dimond): On these applications, Mr. Parke, I note that the word "$25.00"—this is probably an old form before the 1949 Session Laws—is crossed out and the word "$50.00" inserted on each of these applications. Was the word or the figure "$50.00" put in by you or was it there when you received these applications from the company?

A. No. It was there when I received the applications. No doubt the bookkeeper changed those, or whoever made them up, before they were signed. It is an old form. We had a new form out that year, but apparently he got hold of the wrong pad.

Mr. Dimond: Can we introduce those as one file?

The Court: It may be admitted.

The Clerk: Defendant's Exhibit B.

Q. (By Mr. Dimond): Mr. Parke, did you ever go before any United States Commissioner at Naknek and swear out a complaint against any of the officials of Pacific American Fisheries for violating Chapter 66, Session Laws of Alaska, 1949?

A. No.

Q. Were any warrants ever issued for the arrest of any of those officers at Naknek?

A. No.

Q. Or at any other cannery owned by [50] plaintiff? A. No, there wasn't.

Q. After leaving Naknek on July 16th, 1949, or before that date, did you encounter any difficulties at any other of plaintiff's canneries in Alaska of a similar nature to those which you encountered at Naknek in collecting the tax?

A. No. Actually once it was over, well, actually before I got to P.A.F.'s cannery it was understood they were going to pay and pay under protest.

Q. It was understood throughout the industry?

A. Throughout the industry as a whole, why, it was pretty much routine collection right through. They knew what the other companies had done, and they were all throughout the industry pretty much on the same basis, and from one cannery to the other it would be the same routine.

Q. Did you ever threaten to tie up the fish pack, the cannery pack, at Naknek or any other of the plaintiff's canneries?

A. No. To my knowledge it would be no threat to tie up the pack of the cannery at all after quoting them the law and what the law amounted to.

(Testimony of Thomas S. Parke.)

which would indicate a pack could be tied up if the men were not allowed to fish.

Q. Did you ever make that statment to them?

A. I explained to them what the law was, but, as far as tieing up a pack is concerned, I have no knowledge of it.

Q. I mean, did you inform them that, if they disobeyed the [51] law or refused to hire licensed fishermen, that the result could be that their pack could be tied up?

A. Well, it would show in the law what the result it would be as far as tieing up the fishing.

Mr. Dimond: That is all I have.

Cross-Examination

By Mr. Faulkner:

Q. Mr. Parke, in other words, the law is what you were enforcing? A. Yes, sir.

Q. You didn't have any alternative? I mean, the law told you what to do?

A. Yes. The law is definite there that a fisherman must have a license before fishing, and an employer that has employees that are unlicensed employees in his employment would be subject to arrest, too.

Q. And criminal prosecution? A. Yes.

Q. And you told Mr. Edwards and Mr. Nelson that at Naknek?

A. Yes. I explained it to them, and to the best of my knowledge I went over on one of the pamphlets of the law, showed them what it was, and

(Testimony of Thomas S. Parke.)

showed them what it amounted to, and they understood it.

Q. They understood; you told them; you made them understand [52] that they could be subject to arrest if they continued without paying?

A. Yes, they understood it, and really their hands were tied as far as doing anything. It was the company that was supposed to notify them what to do.

Q. Yes. Now, that of course would depend on what the fishermen themselves would do? I mean, the fishermen, if the company didn't get authority to deduct this money from the fishermen in Bristol Bay or pay it, they would have to discharge those fishermen; and that is what you meant by tieing up the pack?

A. It would be a case of either stopping the fishermen from fishing, and, if the fishermen would stop fishing, there would be no fish to pack.

Q. No.

A. In other words, there would be no pack up there.

Q. And that is probably what Mr. Edwards meant when he talked about tieing up the pack?

A. I presume that is what he meant.

Q. Mr. Parke, did you have any warrants for any non-resident fishermen or representatives of companies at any other place that year?

A. Any other company cannery?

Q. Yes.

(Testimony of Thomas S. Parke.)

A. Yes, we did. We swore out complaints at the Alaska Packers [53] at Kvichak.

Q. At Kvichak? A. Two complaints.

Q. And that was prior to your visit to Naknek?

A. Up to this time; yes.

Q. Now, how many places did you visit that year, how many canneries, approximately, for collection of licenses?

A. Oh, it would take a little study to figure out what it was; all those in Bristol Bay, all of the principal ones. There were a few small salt fish and so on I didn't.

Q. Did you go to Port Moller?

A. No; not that far down; no.

Q. Squaw Harbor? A. No.

Q. Or King Cove?

A. We eliminate those. As far as getting there, the expense is too great.

Q. You hardly ever go there, do you?

A. No.

Q. Those licenses are collected through the company?

A. There is agreement to send them in. Ordinarily throughout the year, why, I run into their auditors or the men going down there, and they explain to the bookkeepers what to do, and they send them up.

Q. As a matter of fact, that is the practice everywhere at [54] these canneries of the plaintiff; they will collect the licenses, keep the accounting and make up the applications and send them in?

(Testimony of Thomas S. Parke.)

In other words, you don't go to the individual fishermen to collect the license fees, do you?

A. No. It is the general practice due to the fact that the way the law is written it is a big inconvenience to the canneries to have to have the individual get his license. It is due to the fact that maybe they are fishing and fishing is good and, well, in Bristol Bay, for instance, maybe one man is sick and the other man is a good fisherman and nobody to go out with him; well, if they have to go to, we will say, to a town to get a license before going on the grounds to fish, that would mean that, well, if one man is ready to go, they could, say, take, oh, a beachman or a man out of the shop or something of that sort, and all he would have to do is sign an application and send him out fishing, and in the matter of a few minutes he could be out, and we would pick up that application and issue the license later on.

Q. Yes. It is more convenient for everybody?

A. It seems to be. Everybody seems to be satisfied with it.

Q. And you say that it was understood throughout the industry after this occurrence in Bristol Bay that these fees would be paid under protest?

A. Yes. Each cannery would be routine. They all followed [55] up what the others had done.

Q. This was the first time in 1949 that you had any—I mean—strike that out. In 1949 at Naknek was the first time when you had any meeting with the non-resident fishermen themselves to discuss the law?

(Testimony of Thomas S. Parke.)

A. Yes; any formal meeting with them. Before I knew quite a few of them personally and mingled with them, but not officially.

Q. That was brought about by the fact that the Legislature had changed the law, the license tax, which the men resisted paying?

A. Yes. They wanted to find out what it was first hand, and the meeting would explain that.

Mr. Faulkner: I think that is all.

Redirect Examination

By Mr. Dimond:

Q. One question. Mr. Parke, you spoke about some arrests at Kvichak. Were those officers of the Alaska Packers, or were they fishermen?

A. They were fishermen.

Mr. Dimond: That is all. I have no further testimony, your Honor.

(Witness excused.)

Mr. Faulkner: There is one other thing. I [56] don't know how binding it is, but I don't suppose there is any objection to it. I would like to state to the Court that I have had numerous conferences with the attorney for the Fishermen's Union, to which all these persons, mentioned in the complaint, belong, with reference to the collection of the amounts due them. If counsel has no objection, I will state what it is.

Mr. Dimond: No objection.

Mr. Faulkner: The Alaska Fishermen's Union is the union which brought the suit here in the Anderson case and the union to which all of these men belong. I think Mr. Anderson testified to that. Mr. Jackson in Seattle is the attorney for the union. This matter of refund has been discussed several times. I have had a great deal of correspondence with Mr. Jackson. I have been in conferences with him several times, and it has been agreed that no one will bring a suit for the refund of the license until this case is decided and that it is the desire of the members of the union that the company prosecute this action and get the refund for them. I think that is all we have.

Mr. Dimond: That is all we have.

The Court: Would the parties prefer to make an oral argument or submit it on briefs?

Mr. Dimond: It doesn't make any difference, your Honor, as far as I am concerned. The Court's calendar is crowded. I have a brief prepared. [57]

Mr. Faulkner: I have a brief, too.

The Court: Well, I think then that you might submit briefs. How much time do you want?

Mr. Faulkner: I have mine ready.

Mr. Dimond: Mine is all prepared, your Honor.

Mr. Faulkner: What I was going to is this, that, if I could have just a minute of the Court's time, on the phase of the case which involves payment to the company for these fees that were deducted, I might say that perhaps we didn't need to make that separation. We just brought this suit on behalf of the company and alleged that the com-

pany paid this money, paid all of it, and the company wants it back, and it is a matter between the company and the men as to what becomes of it, but we wanted to put the whole picture before the Court so there will be no question about it, and I just want to say now that we have no question about the sincerity of the Tax Commissioner and Mr. Parke. I think they are both very high-class officials, and they are doing what they think is best, and I want to see them protected, but, if the Court has any doubt about the matter, we could give them, as Mr. Fickel says in his letter there, assurance or guarantee that this money will be refunded to the men in those cases where it was deducted. I don't think that the company should be put to the expense of putting up a bond. We had a bond here once to secure the payment of all these taxes in 1949. That would be [58] rather expensive. I think the company would have no objection to giving Mr. Mullaney its own bond or its own guarantee in any form he wants it.

The Court: Well, does either party wish to say anything in advance of filing briefs as to the inferences to be drawn from the oral testimony or the documentary evidence put into the case this morning. I assume that of course you couldn't have dealt with the facts in your briefs because your briefs were already prepared. I just wondered whether you wished—now to make a brief oral statement as to the inferences that you think are reasonably deductible from the evidence submitted here.

Mr. Faulkner: I would appreciate that, your Honor. I don't think that the Court would want me to go over this brief—it is quite extensive and goes into all phases of it—so long as you are going to read it.

The Court: No.

(Whereupon, oral statements were made to the Court.)

(End of Record.) [59]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz., Pacific American Fisheries, Inc., a corporation, vs. M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, No. 6621-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 59, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness, my signature this 14th day of January, 1953.

/s/ MILDRED K. MAYNARD,
Official Court Reporter, United States District Court, First Division, Territory of Alaska.

[Endorsed]: Filed January 15, 1953. [60]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska,
First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause, and are the ones designated by Appellant and Appellee hereto, to constitute the record of appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 22nd day of January, 1953.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 13,696. United States Court of Appeals for the Ninth Circuit. Pacific American Fisheries, Inc., a corporation, Appellant, vs. M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, First Division.

Filed January 26, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13700

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

RALPH E. HEDGES, Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

STANLEY HEDGES CHILDRESS,
Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court
of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13700

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

RALPH E. HEDGES, Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

STANLEY HEDGES CHILDRESS,
Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court
of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

KENNETH C. HAWKINS, Esq.,
THOMAS E. GRADY, Jr., Esq.

For Respondent:

JOHN PIGG, Esq.

Docket No. 29469

STANLEY HEDGES CHILDRESS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1950

Jul. 10—Petition received and filed. Taxpayer notified. Fee paid.

Jul. 10—Copy of petitioner served on General Counsel.

Jul. 10—Request for Circuit hearing in Seattle, Washington, filed by taxpayer. 7/21/50 Granted.

Aug. 8—Answer filed by General Counsel.

Aug. 8—Request for hearing in Seattle filed by General Counsel.

1950

Aug. 11—Copy of answer and request served on taxpayer, Seattle.

1951

Jan. 12—Entry of appearance of Thomas E. Grady, Jr., as counsel filed.

Jul. 6—Hearing set October 1, 1951, Seattle.

Oct. 9—Hearing had before Judge Murdock, on merits. Cases are consolidated for hearing on joint motion. Permission is given to withdraw exhibits and substitute photostatic copies. Stipulation of facts with exhibits 1-A to 3-C filed at hearing. Briefs due in 60 days. Replies due in 30 days.

Nov. 15—Transcript of hearing 10/9/51 filed.

Dec. 10—Brief filed by taxpayer.

Dec. 14—Motion for extension to February 8, 1952 to file brief filed by General Counsel. 12/18/51 Granted to 1/9/52.

1952

Feb. 27—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 2/29/52 Granted and served.

Mar. 4—Motion to amend findings of fact in brief filed by General Counsel.

Mar. 20—Order amending findings of fact, entered.

Apr. 21—Reply brief filed by taxpayer. Copy served, 4/22/52.

Jun. 30—Findings of fact and opinion rendered, Murdock, Judge. Decision will be entered under rule 50. 7/1/52 Copy served.

Aug. 14—Agreed computation filed.

Aug. 19—Decision entered, Murdock, Judge, Div. 3.

1952

Nov. 12—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by General Counsel.

Nov. 26—Proof of service filed on counsel and taxpayer. (2).

Dec. 4—Motion for extension of time to 2/10/53 to transmit and file record on review, filed by General Counsel.

Dec. 8—Order extending time to 2/9/53 to prepare, transmit and deliver record on review, entered.

1953

Jan. 26—Statement of points filed with statement of service by mail thereon.

Jan. 26—Statement re diminution of record filed with statement of service by mail thereon.

The Tax Court of the United States

No. 29469

STANLEY HEDGES CHILDRESS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency Seattle Division IT:90D:E.E.H. dated

April 17, 1950, and as the basis of his proceeding alleges as follows:

1. Petitioner is an individual with a residence at 2703 Palatine Avenue, Yakima, Washington. The return for the period here involved was filed with the Collector at Tacoma, Washington for the Eastern District of Washington.

2. The notice of deficiency, a copy of which is attached and marked Exhibit "A", was mailed to the petitioner on April 17, 1950.

3. The deficiency as determined by the Commissioner is in income taxes for the calendar year 1944 in the amount of $34,152.08, of which the entire amount of $34,152.08 is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) That there was a deficiency for the year 1944 caused by an understatement of gross income; and that the sum of $57,493.00 represented by cash and other property received by taxpayer in 1944 in settlement of a claim filed against the Estate of John T. Hedges constitutes taxable income to taxpayer, as held in the statement attached to Exhibit "A".

(b) That the taxpayer received dividend income in the year 1944 of $57,439.00, and under the taxpayer's method of accounting (cash basis), the entire amount is to be recorded in the year received.

(c) That the net income is as set forth in the statement attached to said notice dated April 17, 1950, attached hereto as Exhibit "A", particularly in that there was included under "Adjustments to

Income, (a) Other Income" the sum of $57,439.00, and that there is a deficiency of income tax as shown in said notice and in said statement.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) For some years prior to 1923 John T. Hedges and Kitty J. Hedges were husband and wife. Two children were born to their marriage, Ralph Hedges and Ruth Hedges, who later became Ruth Hedges Childress, the mother of the taxpayer. Ruth Hedges Childress predeceased both her mother and father and left as her only heir Stanley Childress, the taxpayer. On August 31, 1923, Kitty J. Hedges died intestate. Prior to the death of Kitty J. Hedges, she and her husband, John T. Hedges, acquired as a part of their community property shares of the capital stock of the Sunshine Mining Company. After the death of Kitty J. Hedges, her surviving husband, John T. Hedges, wrongfully caused said stock certificates to be transferred on the books of the Sunshine Mining Company, and one certificate, representing all of the shares of said stock, was issued to him in his name. John T. Hedges was appointed administrator of the Estate of Kitty J. Hedges, but he failed to include in the inventory of her estate the aforesaid shares of stock, and no administration proceedings were had thereon. Said transfer of said shares of stock was wrongfully made under the laws of the State of Washington, constituting conversion, and the failure to include in the inventory and the failure to administer upon said stock as a part of the assets of Kitty J. Hedges

was likewise wrongful and constituted conversion. Taxpayer, then a minor, as a child of a deceased child inherited one-half of said Kitty J. Hedges' estate, under the laws of descent and distribution of the State of Washington.

(b) On or about February 1, 1944, John J. Hedges died testate, and his estate was duly probated in Yakima County, Washington. During the progress of the probating of the estate of John T. Hedges, proceedings were instituted by taxpayer and taxpayer filed a claim against the estate of John T. Hedges, claiming a share of said estate by reason of the wrongful transfer of said Sunshine Mining Company stock referred to in the last preceding Sub-paragraph (a). Said claim was settled, and upon application to the Superior Court of Yakima County, Washington, an order was entered allowing the taxpayer 3,550 shares of the capital stock of the Sunshine Mining Company, then valued at $35,500.00, and real estate and cash valued at $57,439.00. Said cash, stock and property was received by the taxpayer on September 8, 1944.

(c) Upon the death of said Kitty J. Hedges and upon the administration of her estate, there being no will, Stanley Childress inherited a portion of her estate, including said shares of capital stock, under the laws of the State of Washington, and title thereto at said time vested in taxpayer, and at said time, to-wit, on the 10th day of May, 1924, said John T. Hedges was appointed guardian of Stanley Childress, the taxpayer, and continued to act as such until August 5, 1937, at which time the taxpayer

became of age, and said guardianship proceedings were closed. Said guardian John T. Hedges wrongfully failed to list any portion of said Sunshine Mining Company stock in the inventory filed in the guardianship proceedings and wrongfully failed to report any of the dividends therefrom in said guardianship proceedings.

(d) At all times that John T. Hedges was in possession of the capital stock of the Sunshine Mining Company from the date of said Kitty J. Hedges' death up to and including the time of his death, he included each year in his annual income tax return the amount of dividends he had received upon the stock as a part of his taxable income and each year paid to the Internal Revenue Department the income taxes levied and assessed against the same.

(e) At the time John T. Hedges secured the transfer of said Sunshine Mining Company stock and had the shares of said capital stock issued to him in his own name subsequent to the death of said Kitty J. Hedges, he was guilty of a conversion of said stock, since one-half thereof under the community property laws of the State of Washington belonged to the Kitty J. Hedges estate, and the said Kitty J. Hedges estate was lawfully entitled thereto. By reason of the said conversion under the laws of the State of Washington said John T. Hedges became in contemplation of law the constructive trustee of said stock, cumulating the dividends thereon and paying the income tax thereon, resulting in no tax liability on the part of the taxpayer for any of the moneys or properties received from

the John T. Hedges estate during the year 1944; or, in the alternative, as said dividends were improperly cumulated by said John T. Hedges, and in contemplation of law vested in taxpayer, taxpayer should have been taxed during the years said dividends were paid by said Sunshine Mining Company and should not have been assessed, therefore, in the year 1944, and the additional tax liability of taxpayer for the years prior to 1944 had been fully offset and satisfied by reason of the payments made by the grandfather.

(f) From the time of said transfer of said Sunshine Mining Company capital stock from the community composed of John T. Hedges and Kitty J. Hedges, his wife, to John T. Hedges in one certificate, as aforesaid, said John T. Hedges was the duly appointed, qualified and acting guardian of the estate of taxpayer, who at that time was a minor. Said guardian was in possession of said stock and cumulated the dividends thereon and paid the tax thereon, resulting in no tax liability on the part of the taxpayer during the year 1944, when said stock, cash and property were distributed and delivered to the taxpayer from the estate of John T. Hedges.

(g) From the date of death of said Kitty J. Hedges to and through the year 1944 dividends on the said Sunshine Mining Company stock were available, and upon proper claim being made, said dividends lawfully should have been delivered to the taxpayer. Said dividends were taxable to taxpayer during the years said dividends were actually declared by the Sunshine Mining Company, resulting

in no liability on the part of the taxpayer for the receipt of said stock, cash and real property during the year 1944.

Wherefore, petitioner prays that this Court may hear the proceeding and prays that the Court enter herein an order vacating said deficiency assessment and holding the taxpayer not liable for any additional tax during the calendar year 1944.

/s/ KENNETH C. HAWKINS,
Attorney for Petitioner

State of Washington,
County of Yakima—ss.

Stanley Hedges Childress, being duly sworn, says that he is the petitioner above named; that he has read the foregoing Petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ STANLEY HEDGES CHILDRESS

Subscribed and sworn to before me this 7th day of July, 1950.

[Seal] /s/ DOROTHY ESCHBACH,
Notary Public in and for the State of Washington, residing at Yakima.

EXHIBIT "A"

Treasury Department, Internal Revenue Service
Securities Building, Seattle 1, Wash.

Office of Internal Revenue Agent in Charge
Seattle Division IT:90D:EEH April 17, 1950

Mr. Stanley Hedges Childress
2602 Summitview, Yakima, Washington.

Dear Mr. Childress:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944, discloses a deficiency of $33,762.08, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Seattle 1, Washington for the attention of IT:90D:EEH. The signing and filing of this form will expedite the closing of you return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the in-

terest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,
Commissioner
/s/ By S. R. STOCKTON,
Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Form of waiver.
EEH:em

Statement

Mr. Stanley Hedges Childress,
2602 Summitview, Yakima, Washington.

Tax liability for the taxable year ended December 31, 1944.

	Deficiency
Income tax	$33,762.08

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated November 19, 1947; to your protest dated March 5, 1948; and to the statements made at the conferences held on May 20, 1948 and October 4, 1948.

It is held that the sum of $57,439.00 represented by cash and other property received by you in 1944 in settlement of a claim filed against the estate of John T. Hedges constitutes taxable income to you.

A copy of this letter and statement has been

mailed to your representative, Mr. D. W. Frame, 221 Miller Building, Yakima, Washington, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Income

Adjusted gross income as diclosed by return, Form 1040		$ 538.02
Unallowable deductions and additional income:		
(a) Other income	57,439.00	
Total		$57,977.02
(b) Standard deduction	500.00	
Net income adjusted		$57,477.02

Explanation of Adjustments

(a) As explained above, it is held that the amount of $57,439.00 constitutes taxable income to you, and since such income was not reported on your return, your net income is increased by the amount shown.

(b) The standard deduction is allowed in the computation of your net income.

Computation of Income Tax

Net income adjusted	$57,477.02	
Less: Surtax exemption	500.00	
Surtax net income	$56,977.02	
Surtax		$32,052.77

Net income adjusted	$57,477.02	
Less: Normal-tax exemption.	500.00	
Balance subject to normal tax	$56,977.02	
Normal tax at 3 per cent		1,709.31
Income tax liability		$33,762.08
Income tax liability disclosed by return:		
Account No. 10,856,022		None
Deficiency in income tax		$33,762.08

[Endorsed]: T.C.U.S. Filed July 10, 1950.

[Title of Tax Court and Cause No. 29469.]

ANSWER

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition herein, admits, alleges and denies as follows:

1. Admits that petitioner is an individual with residence at Yakima, Washington. It is also admitted that the return for the taxable year involved was filed with the Collector of Internal Revenue at Tacoma, Washington.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the deficiency as determined by the respondent is in income tax for the calendar year 1944, the entire amount of which is in dispute. Respondent denies that the amount of said deficiency is $34,152.08, as alleged in paragraph 3 of the petition and alleges that the amount of deficiency stated in the statutory notice is $33,762.08.

4 (a), (b) and (c). Denies that the respondent committed error in determining the deficiency as set forth in the statutory notice, and specifically denies the allegations of error contained in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5 (a). Admits that John T. Hedges and Kitty J. Hedges were husband and wife. Admits that two children were born to their marriage, Ralph Hedges and Ruth Hedges, who later became Ruth Hedges Childress, the mother of the taxpayer. Admits that Ruth Hedges Childress predeceased both her mother and father and left as her only heir Stanley Childress, the taxpayer. Admits that in 1923 Kitty J. Hedges died intestate. Admits that prior to the death of Kitty J. Hedges she and her husband, John T. Hedges, owned certain shares of the capital stock of the Sunshine Mining Company. Admits that John T. Hedges was appointed administrator of the estate of Kitty J. Hedges and that in preparing the inventory of her estate he failed to include therein any shares of the stock of the Sunshine Mining Company. Admits that taxpayer was a child of a deceased child of Kitty J. Hedges. Denies each and

every other material allegation of fact contained in subparagraph (a) of paragraph 5 of the petition.

(b). Admits that on or about February 1, 1944, John T. Hedges died testate and his estate was duly probated in Yakima County, Washington. Admits that during the progress of the probating of the estate of John T. Hedges taxpayer filed a claim against said estate. Admits that said claim was settled without litigation, as a result of which petitioner received 3,550 shares of the capital stock of the Sunshine Mining Company, and real estate and cash valued at $57,439.00. Admits that said cash, stock and property were received by taxpayer on September 8, 1944. Denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c). Admits that upon the death of Kitty J. Hedges and upon the administration of her estate, there being no will, Stanley Childress inherited a portion of her estate under the laws of the State of Washington. Denies each and every other material allegation of fact contained in subparagraph (c) of paragraph 5 of the petition.

(d). For lack of information from which to determine the truth or correctness of the allegations contained in subparagraph (d) of paragraph 5 of the petition, the same are denied.

(e), (f) and (g). Denies the allegations contained in subparagraphs (e), (f) and (g) of paragraph 5 of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be approved.

/s/ CHARLES OLIPHANT, WHP.
Chief Counsel, Bureau of Internal Revenue

Of Counsel:

WILFORD H. PAYNE,
Division Counsel,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Aug. 8, 1950.

The Tax Court of the United States

Docket No. 29288

RALPH E. HEDGES, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 29469

STANLEY HEDGES CHILDRESS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to these proceedings, by their respective attorneys, that the following facts are true and that the same may be so taken and considered by the Court as offered in evidence by said parties: Provided, however, that this stipulation shall be without prejudice to the right of any of said parties to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

(1) Subject to the approval of the Court, these proceedings may be consolidated for hearing.

(2) Ralph E. Hedges, the petitioner in the proceeding at Docket No. 29288, is an individual, whose residence is at 120 North 48th Street, Seattle, Wash-

ington. Stanley Hedges Childress, the petitioner in the proceeding at Docket No. 29469, is an individual, whose residence is at 2703 Palatine Avenue, Yakima, Washington. Their returns for the taxable year ended December 31, 1944, were filed with the Collector for the District of Washington, on the cash basis.

(3) Ralph E. Hedges is the son of the marriage of John T. Hedges and Kittie J. Hedges, who, prior to and at the time of their respective deaths, resided at Yakima, Washington. Kittie J. Hedges died, intestate, on March 23, 1923. Her surviving husband, John T. Hedges, was thereafter married to Jessie Belton on or about April 5, 1924. John T. Hedges died, testate, on February 1, 1944.

(4) Two children were born to the marriage of John T. Hedges and Kittie J. Hedges, namely, the petitioner, Ralph E. Hedges, and a daughter, Ruth Hedges. Ruth Hedges was married prior to the year 1923, and became Ruth Hedges Childress. Ruth Hedges Childress predeceased her mother, leaving as her only surviving issue a son, namely, the petitioner, Stanley Hedges Childress. Stanley Hedges Childress was a minor at the time of the death of his grandmother, Kittie J. Hedges, on March 23, 1923.

(5) The estate of Kittie J. Hedges was administered in the Superior Court of the State of Washington in and for Yakima County (In Probate), in Proceeding No. 4728. Attached hereto and made a part hereof, as Exhibit 1-A, are true and correct (certified photostat) copies of the following de-

scribed documents, relating to the administration, in said Court, of the estate of Kittie J. Hedges: (Said Exhibit 1-A consists of 35 pages, exclusive of certifying certificate, which, for identification purposes, have been numbered 1 to 35, inclusive.)

Description of Document—Exhibit 1-A

(a) "Petition for Letters of Administration" filed by John T. Hedges, surviving husband of Kittie J. Hedges, Deceased, on August 30, 1923—pages 1, 2, 3.

(b) "Order Appointing Administrator", filed for Record October 3, 1923—pages 4, 5.

(c) "Letters of Administration", filed for Record October 29, 1923—pages 6, 7.

(d) "Request for Notice of Proceedings", filed April 25, 1924—pages 8, 9.

(e) "Petition to Award Property in Lieu of Homestead", filed 5-31-24—pages 10, 11, 12.

(f) "Order Awarding Property in Lieu of Homestead", filed for Record 6-21-24—pages 13, 14, 15.

(g) "Final Account and Report of Administrator and Petition for Partition and Distribution and Discharge of said Administrator", filed August 19, 1924—pages 16 to 20, incl.

(h) "Inventory and Appraisement", filed 9-13-24—pages 21, 22, 23.

(i) "Decree Approving Final Account, Partitioning and Distributing Estate, Determining Heirs and Discharging Administrator"—pages 24 to 35, incl.

(6) The estate of John T. Hedges was administered in the Superior Court of the State of Wash-

ington in and for Yakima County (In Probate), in Proceeding No. 13326. Attached hereto and made a part hereof, as Exhibit 2-B, are true and correct (certified photostat) copies of the following-described documents, relating to the administration, in said Court, of the estate of John T. Hedges: (Said Exhibit 2-B consists of 67 pages, exclusive of certifying certificate, which, for identification purposes, have been numbered 1 to 67, inclusive.)

Description of Document—Exhibit 2-B

(a) "Petition for Probate of Will", including Exhibit "A" thereof, being the "Last Will and Testament of John T. Hedges", filed by Jessie Belton Hedges, surviving wife of John T. Hedges, Deceased, on February 14, 1944—pages 1, 2, 3.

(b) "Order Admitting Will to Probate", filed for Record 2-15-44—pages 3, 4.

(c) "Letters Testamentary"—page 5.

(d) "Inventory and Appraisement", filed May 22, 1944—pages 6 to 16, incl.

(e) "Petition for Order of Solvency", filed 6-16-44—pages 17, 18.

(f) "Order of Solvency", filed for Record 6-16-44—page 19.

(g) "Order Relative to the Disbursement of Dividends", filed for Record 8-8-44—pages 20, 21.

(h) "Order for Withdrawal of Original Claim", filed for Record 8-9-44—page 22.

(i) "Order" (Relating to issuance of 3,550 shares

Sunshine Mining Company stock to Stanley Hedges Childress) filed for Record 9-7-44—pages 23, 24.

(j) "Release" (Executed by Stanley Hedges Childress on 9-8-44)—page 25.

(k) "Release" (Executed by Ralph Hedges on 8-8-44)—page 26.

(l) "Petition for Distribution", filed 1-29-45—pages 27 to 39, incl.

(m) "Decree of Distribution", filed for Record 2-28-45—pages 40 to 53, incl.

(n) "Amended Creditor's Claim of Ralph E. Hedges", filed 8-8-44—pages 54 to 60, incl.

(o) "Creditor's Claim of Stanley Hedges Childress", filed 8-11-44—pages 61 to 67, incl.

(7) Prior to her death, on March 23, 1923, shares of the capital stock of Sunshine Mining Company had been issued in the name of Kittie J. Hedges, as follows: (According to the stock records of the Sunshine Mining Company)

Certificate No.	Date Issued	Number of Shares
385	9-21-21	1,250
423	11- 8-21	1,000
609	10- 9-22	2,350
	Total	4,600

(8) Prior to his death, on February 1, 1944, seventeen thousand four hundred and fifty (17,450) shares of the capital stock of the Sunshine Mining Company had been issued in the name of John T. Hedges. With respect to these shares of stock, the following tabulation shows (a) certificate numbers;

(b) dates of issuance; (c) number of shares; and (d) from whom transferred: (According to the stock records of the Sunshine Mining Company)

Certificate Number	Date Issued	Number of Shares	From Whom Transferred
384	9-21-21	1,250	Treasury
525	10-18-21	5,000	Treasury
610	10- 9-22	2,350	Treasury
766	7-14-23	1,000	R. E. McFarland
766	7-14-23	1,000	J. L. Carson
766	7-14-23	4,600	Kittie J. Hedges
795	12- 8-23	1,000	Treasury
1,065	6-10-23	1,000	M. E. Olsen
1,067	6-10-23	250	E. A. Isaacson
	Total	17,450	

(9) Subsequent to the death of John T. Hedges, on February 1, 1944, the shares of the capital stock, referred to in paragraph (8), above, were transferred to others, on the stock records of the Sunshine Mining Company, as follows:

Certificate Number	Date Issued	Number of Shares	Transferred to Whom
Y-8536-8570	8-12-44	3,500	Ralph Hedges
YO-5159	8-12-44	50	Ralph Hedges
YO-5166	8-12-44	50	Stanley Hedges Childress and Doris Laney Childress
Y-8571-8605	8-12-44	3,500	Stanley Hedges Childress and Doris Laney Childress
Y-8606-8686	8-12-44	8,100	Jessie Belton Hedges
YO-5348	6-29-45	50	Jessie Belton Hedges
Y-9487-9508	6-29-45	2,200	Jessie Belton Hedges
	Total	17,450	

(10) During the years 1927 to 1944, inclusive,

cash dividends were paid by the Sunshine Mining Company on its outstanding capital stock, as follows:

Year	Per Share	Amount Attributable to 3,550 shares
1927	$0.08	$ 284.00
1928	0.12	426.00
1929	0.22	781.00
1930	0.16	568.00
1931	0.02	71.00
1932	0.10	355.00
1933	0.25	887.50
1934	0.68	2,414.00
1935	1.40	4,970.00
1936	2.25	7,987.50
1937	3.00	10,650.00
1938	2.20	7,810.00
1939	1.60	5,680.00
1940	1.60	5,680.00
1941	1.30	4,615.00
1942	.55	1,952.50
1943	.45	1,597.50
1944	.20	710.00
Total		$57,439.00

(11) Attached hereto and made a part hereof, as Exhibit 3-C, is a true and correct copy of a certain "Contract of Settlement" entered into, under date of August 8, 1944, by and between the petitioner, Ralph E. Hedges, and Jessie Belton Hedges, individually and as executrix of the estate of John T. Hedges, deceased.

(12) In addition to the documents included in Exhibits 1-A and 2-B, hereinabove referred to, any of the parties to these proceedings may offer in evidence, without objection, a duly certified copy of any other document included as a part of the record

or file of the Superior Court of the State of Washington in and for Yakima County (In Probate), "In the Matter of the Estate of Kittie J. Hedges, Deceased", No. 4728, or as a part of the record or file of said Court "In the Matter of the Estate of John T. Hedges, Deceased", No. 13326; also, such a duly certified copy of any document included as a part of the record or file of said Court "In the Matter of the Guardianship of Stanley Hedges Childress, a Minor", No. 4946, may likewise be offered in evidence, without objection.

/s/ A. R. KEHOE,
Counsel for Petitioner, Ralph E. Hedges, Docket No. 29288.

/s/ KENNETH C. HAWKINS,
Counsel for Petitioner, Stanley Hedges Childress, Docket No. 29469.

/s/ CHARLES OLIPHANT, WHP,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Oct. 9, 1951.

[Title of Tax Court and Causes Nos. 29469, 29288.]

PROCEEDINGS

Circuit Court of Appeals Courtroom, Seattle, Washington—October 9, 1951—10:50 a.m.

(Met, pursuant to notice.)

Before: Honorable J. Edgar Murdock, Judge.

Appearances: A. R. Kehoe, Colman Bldg., Seattle, Wash., Counsel for Petitioner Hedges. Kenneth C. Hawkins, 614 Miller Bldg., Yakima, Wash., Counsel for Petitioner Childress. John H. Pigg, Counsel for the Respondent.

Statement of the Case on Behalf of the Petitioner

Mr. Hawkins: As I understand from our prior discussion, Your Honor, you have many of the details of this case in mind, but there are just one or two points that I want to point out to Your Honor. At the time of the death of John Hedges' first wife, Stanley Childress was about six years old. His uncle, Ralph Hedges, the other taxpayer, was approximately twenty-five or twenty-six years old. When Kitty Hedges died, her husband, John T. Hedges, was appointed Administrator of her estate, and just prior to the closing of her estate, by reason of the fact that Stanley Childress was a minor, it was necessary to appoint a guardian of his estate, and John Hedges was appointed guardian, of Stanley Childress' estate.

The Court: Who was his grandfather?

Mr. Hawkins: Who was his grandfather; and he became the legal guardian, and he took possession of the assets in the Kitty Hedges estate, which, under the community law, descended to Stanley Childress.

The Court: Under the law, they should have gotten that done promptly under the proper administration of the estate? Is that correct?

Mr. Hawkins: That is correct. Prior to the time that Kitty Hedges passed away, John and Kitty both acquired a number of shares, 14,200 shares of stock in the Sunshine Mining Company. That stock was not listed in the inventory of the Kitty Hedges Estate. As a matter of fact, about two months or so prior to the time that John Hedges was appointed Administrator of his wife's estate,—she died without a will,—after Kitty Hedges had actually died, he went to the office of the Sunshine Mining Company, and had that stock transferred into his own name, and therefore, when he was appointed Administrator, he did not list the stock in the estate, nor did he list any dividends or income from it in the guardianship estate, which he was guarding. Under the Washington Community law, one-fourth of those 14,200 shares descended to Ralph Hedges, and one-fourth to Stanley Childress.

I might point out, the mother of Stanley Childress, or Ruth Childress, passed away prior to the death of her mother, Kitty Hedges. These facts are all stipulated.

Now, there is one other thing that I want to point out, which I think should be borne in mind, and that is the fact, as suggested at the outset, when

these claims were filed against the Hedges estate, one by Ralph Hedges, and one by Stanley Childress, Ralph Hedges was represented by an attorney who was paid $21,000.00, and this attorney's fee,—that is the attorney's fee which has to be distributed in connection with what you find was earned in connection with the income dividends from the Sunshine Mining Company. Stanley Childress, however, was not represented by an attorney. The individual who prepared his claim was the attorney for the estate, or for the executor of the estate, the then Mrs. Jessie Hedges. It was her attorney that prepared the claim for Stanley. In paying those claims, each of the Claimants received 3,550 shares of stock in the Sunshine Mining Company, which was exactly one-fourth of the 14,200 that stood in the name of John and Kitty, prior to Kitty's death. Stanley received 3,550 shares of the Sunshine Stock, and he received property and cash in full settlement of the balance of his claim. He did not receive cash for the entire balance over and above the Sunshine Stock. I wanted to point this out to Your Honor, as it may possibly have some significance.

I think that briefly outlines the essential facts.

The Government takes the position that these dividends were received by John,—when they were turned over to Stanley and Ralph in 1944, the year of John Hedges' death, or that portion of the amount turned over equivalent to the dividends received by John during his lifetime, and that that was income in that year to the taxpayer. That is the Government's position.

It is our position that it is not income to the taxpayer during the year 1944, but, in the event it is deemed income to the taxpayer, it should be attributed to each of the years in which the dividends were actually realized by the grandfather, John Hedges, the father of Ralph Hedges. We have several theories to sustain our position in that respect, but I suppose that should be presented in the brief.

Mr. Kehoe: I have nothing to add except as to the issue on the attorney's fees, but that will be covered in the briefs, also.

Statement of the Case on Behalf of the Respondent
By Mr. Pigg

Mr. Pigg: If the Court please, in view of what has transpired, and Your Honor's familiarity with the issues involved, I see no point in taking time to prolong the opening statement. I think there are one or two points that might be pointed out at this time factually, as the evidence will show, that at all times prior to 1944 and subsequent to the death of the first decedent, that is, Kitty Hedges, the Mother and the Grandmother of the two Petitioners here, John T. Hedges, the surviving spouse stood as the unchallenged owner of the shares of stock in controversy. I agree with Counsel that various theories no doubt will be presented in support of the Petitioners' contention, but they can be answered just as well in brief as gone into here.

The cases, I do not believe, have been consolidated.

The Court: They may be consolidated for the purpose of this hearing.

Mr. Pigg: I assume the record is clear, but in case it is not, as I do not recall any statement of appearances, Mr. Kehoe appears for one Petitioner, and Mr. Hawkins appears as Counsel for the other Petitioner.

The Court: Your position, as I take it, is that these two taxpayers were on a cash basis and they had nothing to report until they got the cash?

Mr. Pigg: Exactly, Your Honor.

Your Honor, the parties have included a formal written stipulation, and, in effect, it consists primarily of what we believe to be the material documents in the two probate proceedings in the Superior Court of the State of Washington for Yakima County, in which the estates of both Kitty Hedges and John T. Hedges were administered.

The Court: The stipulation and the exhibits may be received in evidence.

Mr. Kehoe: Counsel indicated that he would stipulate with us that Kitty J. and John T. Hedges were married on or about April 25, 1888.

Mr. Pigg: It is so stipulated.

The Court: And I take it that they continued as husband and wife until the death of Kitty?

Mr. Kehoe: Yes, Your Honor. I will cover that in my examination.

Mr. Hawkins: May I proceed, then, Your Honor.

The Court: Yes.

Evidence on Behalf of the Petitioners

Mr. Hawkins: I will call Mrs. Dean.

JESSIE BELTON DEAN

a witness called on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hawkins): Will you state your name? A. Jessie Belton Dean.

Q. Where do you live, Mrs. Dean?

A. Yakima, Washington.

Q. You came over here at the request of myself, to testify in this proceeding? A. I did.

Q. Did you know John Hedges during his lifetime? A. I did.

Q. I believe he was your husband?

A. He was.

Q. When were you and John Hedges married?

A. April 5, 1924.

Q. And from that time down until the time of his passing away, you were husband and wife?

A. Yes.

Q. And he passed away on February 1st, 1944?

A. Yes.

Q. And you were appointed the executrix of his estate? A. Yes.

Q. He left a will, did he not? A. He did.

Q. Now, did you know John Hedges' first wife, Kitty Hedges, during her lifetime? A. I did.

Q. I believe it was a year after she passed away that you and John were married?

(Testimony of Jessie Belton Dean.)

A. A little over a year.

Q. And did you hear John Hedges at or about the time you married him, or shortly after, say anything to you concerning the Sunshine Mining Company stock? A. Yes.

Q. I wonder if you will just tell the Court what he said in that respect?

A. Well, I suppose you want me to say what he said in the conversation we had just after the settlement of the estate?

Q. Of Kitty's estate? A. Yes.

It was right after we were married, anyway, and he made the remark,—he said, "Now, Jessie, Kitty asked me to promise to never let Ralph know that we had the Sunshine stock, and I want you to promise me that you will never tell him."

Q. Now, did you have occasion to talk to your husband, John Hedges, concerning the Sunshine stock at any time after that, Mrs. Dean?

A. Oh, yes.

Q. Was there any discussion at any time about how the stock was to be disposed of at the time of his death?

A. Well, you see there was a great deal of disturbance and ill feeling and so on at the time of Kitty's death. She left no will, and Ralph took the matter to court immediately after her death to get what he thought was his share, although there was no will and the laws of the land would have given him his one-quarter anyway; and, consequently, his

(Testimony of Jessie Belton Dean.)

father was very much disturbed, and before we were married he willed everything to me; I was then just Jessie Ames Belton; and just shortly before we were married, he willed everything to me. I will say this, going back to the time that he asked me never to tell Ralph, I made the remark to him, "Don't you have to declare the Sunshine stock in the inventory of the estate?" And he said, "I do not," because it was of no value, and he said, "What difference does it make?" And he said, "My attorney told me to not declare anything that was of no value;" and it seems that at that time there was a sort of policy being carried on by the attorneys, to not declare things of no value, because of the lengthy records that were involved many times; so they had that sort of an agreement, and so he did not declare them.

Q. Now, did he say anything to you about what you were to do with the property after it was willed to you?

A. Well, of course, it did not come into dividends; it was $60,000.00 in the red at the time when I married him, and then later on when it did come in and began paying dividends, as the years went on, I said to him a couple of times, "I wonder if you ought not to make a new will," and he said, "No; that will stands; I will leave it to you to take care of everything as between you and him."

Q. With respect to Ralph? A. Yes.

Mr. Hawkins: I think that is all.

(Testimony of Jessie Belton Dean.)

Cross Examination

Q. (By Mr. Pigg): Mrs. Dean, in the stipulation of facts which has been filed in these cases, there is included among the exhibits a document described as a contract settlement, to which Ralph E. Hedges and one Jessie Belton Hedges, as Executrix of the Estate of John B. Hedges, and individually, are named as the parties thereto. Are you the same person?

A. I am the same person.

Mr. Pigg: I don't think I have any further questions.

The Court: If there are no further questions, the witness is excused.

(Witness excused.)

Mr. Hawkins: Mr. Stanley Hedges Childress.

STANLEY HEDGES CHILDRESS

a witness called on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hawkins): Will you state your name?

A. Stanley Hedges Childress.

Q. Where do you live?

A. Yakima, Washington.

Q. How old are you at the present time?

A. 35.

(Testimony of Stanley Hedges Childress.)

Q. When and where were you born?

A. Yakima, Washington, July 29, 1916.

Q. You are the Stanley Hedges Childress that is named in these proceedings? A. I am.

Q. As a Petitioner? A. I am.

Q. Mr. Childress, you became of age, I believe, in 1937, did you not? A. That is right.

Q. What were you doing at that time? Were you gainfully employed or not?

A. At the time I reached my majority, I was with my father and grandfather in Yakima on a fruit ranch.

Q. You were working on their fruit ranch?

A. Yes, and I helped them.

Q. And did you do any other work from that time on up until the time you entered the service?

A. Yes.

Q. What kind of work was that?

A. At the time that I was home in Yakima, I was taking a correspondence course in refrigeration and air conditioning, which was to be completed in Chicago. I completed that in 1940, October 1940. When that was completed I went from there to California.

Q. And then what did you do after you got to California?

A. I was inducted into the service in December, 1942.

Q. Prior to the time you were inducted into the service, will you just state to the Court what was your maximum income in one month?

(Testimony of Stanley Hedges Childress.)

A. $225.00 including the overtime.

Q. What kind of work were you doing at that time?

A. I was working for Vultee Aircraft Company in California, as a lead man.

Q. And you went into the Army in what capacity?

A. As a private in the Army Air Forces.

Q. And how long were you with the Army?

A. Three years.

Q. And did you serve any time overseas?

A. Approximately a year.

Q. And did you remain a private throughout the time you were in the service?

A. I was advanced to private first class.

Q. What was the highest income you had in any one month during the time that you were in the service? A. My service pay.

Q. What was that?

A. Well, it was a basic of $50.00 plus overseas pay, and I have forgotten exactly what that was.

Q. Were you in the service in 1944 when your grandfather, John T. Hedges, passed away?

A. Yes, I was.

Q. And where were you stationed at that time?

A. At that time, at the time of his death, I was in Cook, Nebraska.

Q. When did you first hear that you had the possibility of a claim against his estate,—against the John T. Hedges estate?

A. I don't recall the exact date, but it was in the

(Testimony of Stanley Hedges Childress.)

early part of 1944, when my wife, Doris, sent me a newspaper clipping stating that Ralph had filed a claim against the estate.

Q. And were you later contacted by the attorney for the estate? A. Yes.

Q. And who was that?

A. Harcourt Taylor.

Q. And did he contact you personally, or did you have correspondence with him?

A. It was correspondence.

Q. And it ended up in your assigning the claim against the John T. Hedges Estate?

A. Yes.

Q. Where were you when you assigned that claim?

A. I was in Great Bend, Kansas.

Q. Now, was that assigned as a result of any collusion between you and Mrs. Hedges in order to reduce the assets in the John T. Hedges estate?

A. No.

Mr. Pigg: I will object to that and move to strike as it calls for a conclusion as to what this witness considers a collusion.

The Court: Is anybody claiming there was a collusion?

Mr. Pigg: No.

The Court: Well, he said there was not; so everybody should be happy.

Mr. Pigg: Yes, but I don't know what point he is going to make.

(Testimony of Stanley Hedges Childress.)

The Court: Just to show that there was no collusion.

Mr. Hawkins: Did you have any contact with Jessie Hedges at that time, the lady who was on the stand this morning just before you?

A. Well, we have regular correspondence. I say regular, but I am a poor correspondent. I mean that we did correspond.

Q. Was there anything in that correspondence in which you agreed to file a claim in order to reduce the assets of the John T. Hedges estate?

A. No, sir.

Mr. Hawkins: You may examine.

Cross Examination

Q. (By Mr. Pigg): Mr. Childress, included among the documents and exhibits to the stipulation of facts in this case is a photostatic copy of a document being a claim filed by one Stanley Hedges Childress against the estate of John T. Hedges. You are the person described in that document, are you not?

A. I am Stanley Hedges Childress, yes.

Mr. Pigg: That is all I have.

The Court: The witness is excused.

(Witness excused.)

Mr. Hawkins: Will you come forward, please, Mr. Hardy?

FRANK M. HARDY

a witness called for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hawkins): Will you state your name? A. Frank M. Hardy.

Q. Where do you live, Mr. Hardy?

A. I live at Yakima, Washington.

Q. What is your occupation?

A. I am Vice-President and Treasurer of the Sunshine Mining Company.

Q. You came here at our request for the purpose of testifying in these proceedings? A. I did.

Q. Now, I think you stated that you were Vice-President and Treasurer of the Sunshine Mining Company? A. That is right.

Q. And what are your duties in that connection, sir?

A. Well, I am also a director in the Company, and I am directly in charge of the home office, the Yakima office.

Q. What is the home office? Where is the home office?

A. It is in Yakima. It is a transfer office and a dividend-disbursing office of the Company.

Q. And do you have under your direct supervision and control the records of the Sunshine Mining Company? A. I do.

Q. I wonder if you will state whether or not

(Testimony of Frank M. Hardy.)

John Hedges was ever an officer of the Sunshine Mining Company?

A. He was secretary years ago.

Q. As a matter of fact, he was one of the original investors in that Company; isn't that right?

A. That is right.

Q. And he did serve as an officer of that company; isn't that right? At one time?

A. Yes.

Q. And he was a close friend of the other individuals who brought the Company into being?

A. To my knowledge, he was; yes.

Q. Now, you have brought with you, and they are in the package on the Counsel Table, the original records pertaining to the stock of John T. Hedges? A. That is right.

Mr. Hawkins: Your Honor, with Counsel's permission, instead of using the original records, we have prepared photostatic copies thereof, which I would prefer to use instead of the originals, for the purpose of identification.

The Court: That may be done, if there is no objection.

Mr. Pigg: No objection.

Mr. Hawkins: The originals are here for inspection if Counsel wishes.

The Court: Why don't you identify them and put them in? You are not going to object to them, Mr. Pigg?

Mr. Pigg: No.

(Testimony of Frank M. Hardy.)

The Court: You might put those in instead of having them stamped twice.

The Clerk: They will be Exhibits 4, 5, and 6.

(Whereupon, the documents above-referred to were marked for identification as Petitioners' 4, 5, 6.)

Q. (By Mr. Hawkins): Mr. Hardy, I am handing you Petitioners' 4 for identification. That is a photostatic copy of what record?

A. The stockholder's account of John T. Hedges.

Q. And is that a true copy of the original in the records of the Company? A. Yes.

Q. And kept under your supervision?

A. Yes.

Mr. Hawkins: I will offer Petitioners' 4.

Mr. Pigg: No objection.

The Court: Admitted.

(The document previously marked for identification as Petitioners' 4 was received in evidence.)

Q. (By Mr. Hawkins): Mr. Hardy, I am handing you Petitioners' 5 for identification. Will you state what those three sheets are?

A. This is the stock ledger of John T. Hedges, issued after the previous one; in other words,—this one followed.

Q. In chronological order?

A. That is right.

Mr. Hawkins: We will offer Petitioners' 5 for identification.

Mr. Pigg: No objection.

(Testimony of Frank M. Hardy.)

The Court: Admitted.

(The document previously referred to as Petitioners' 5 for identification, was received in evidence.)

Q. (By Mr. Hawkins): Mr. Hardy, I am handing you Petitioners' 6 for identification. Will you state what that is?

A. There are several different certificates here.

Q. Those are photostatic copies of certificates issued by the Sunshine Mining Company, which have been returned to the Company and cancelled?

A. Yes; and issued to John T. Hedges, that is right.

Mr. Hawkins: I will offer in evidence, Your Honor, Petitioners' 6 for identification.

Mr. Pigg: No objection.

The Court: Admitted.

(The document previously referred to as Petitioners' 6 for identification, was received in evidence.)

Mr. Hawkins: Your Honor, while the witness was on the stand, I thought I might call to Your Honor's attention the stipulation only admits the existence of 13,200 shares in the possession of Kitty Hedges and John Hedges, at the time of the death of Kitty Hedges. Actually there were 14,200 shares that was evidenced by the first certificate shown in connection with Exhibit 6. It is a certificate issued to Mrs. R. E. MacFarland for 1,000 shares, and endorsed by her on October 19, 1922, to John T. Hedges in the presence of E. Wood. The endorse-

(Testimony of Frank M. Hardy.)

ment shows that 1,000 block shares of Sunshine Mining Company stock was in the possession of John T. Hedges at the time of the death of Kitty Hedges, and prior to her death. I think that is perhaps something that Mr. Pigg had not known before, and for that reason I want to mention it.

Mr. Pigg: If Your Honor please, so far as the number of shares are concerned, insofar as the 14,200 that he mentioned here are concerned, that figure is based upon what Government's Counsel and what the Petitioners' Counsel believed were correct at the time of stipulation. So far as I know, there is no importance here on the issue before the Court, as to whether there were 14,200 or 13,200. I know we discussed it at one time, and we could not determine from the information we then had which it was.

So far as the Respondents are concerned, we are willing to stand on whatever the Exhibit shows in that regard. It makes no difference.

Mr. Hawkins: I would like to have the record show that the originals are here for Counsel's inspection. There is one other point that I want to call to Your Honor's attention. If you will observe, some of them are issued in the name of Kitty J. Hedges, and I want to call your Honor's attention to the endorsement on the reverse side thereof, dated July 14, 1923, "Kitty J. Hedges, by John T. Hedges," and the assignee or transferee is John T. Hedges; and that was some three or four months after Kitty Hedges' death.

(Testimony of Frank M. Hardy.)

Mr. Hawkins: I have no further questions.

Mr. Pigg: No questions.

The Court: The witness is excused.

(Witness excused.)

Mr. Hawkins: Counsel has in his possession some income tax returns of John T. Hedges, which we have agreed may be offered in evidence, copies thereof, and I would like to have marked for identification the returns for the years 1934, 1935, 1937, 1938, 1939, 1940, 1941, and 1942 and 1943.

The Court: Are you going to offer all those?

Mr. Hawkins: Yes.

The Court: Is there any objection?

Mr. Pigg: No objection.

The Court: They may be admitted.

Mr. Pigg: As one exhibit?

Mr. Hawkins: As one exhibit.

The Clerk: Petitioners' 7.

(The document above-referred to was marked for identification as Petitioners' Exhibit 7.)

The Court: They may be admitted.

(The documents previously marked for identification as Petitioners' Exhibit 7, were received in evidence.)

Mr. Hawkins: The years '34 to '43 inclusive.

Mr. Kehoe: I believe 1936 was omitted.

Mr. Hawkins: With the exception of 1936. I wonder if Counsel will stipulate that these exhibits may be withdrawn after the case?

The Court: You mean when the decision becomes final?

Mr. Hawkins: Yes.

The Court: They will be sent back to you whether you agree or not.

Mr. Pigg: And we would like to have leave to withdraw any exhibit for the purpose of photostating them.

Mr. Hawkins: We have no objection.

The Court: That may be done.

Mr. Hawkins: Your Honor, the stipulation provides that either party may offer in evidence certain certified copies, that is, certified by the County Clerk, of the proceedings in the John T. Hedges estate and the Kitty J. Hedges estate, and the matter of guardianship of Stanley Hedges Childress. I would like to have that offered as Exhibit 8 in evidence. That is, a certified copy of the proceedings of the guardianship proceedings, the guardianship involving Stanley Hedges Childress.

Mr. Pigg: No objection.

The Court: That will be admitted as Exhibit 8.

(The document above-referred to was received in evidence as Petitioners' Exhibit 8.)

Mr. Hawkins: We have no further evidence. The stipulation of facts has already been admitted.

Mr. Pigg: Yes.

Mr. Kehoe: I have just one witness.

The Court: All right.

Mr. Kehoe: Mr. Ralph Hedges. This witness, Your Honor, has a little difficulty in hearing, and I may have to talk quite loud.

RALPH E. HEDGES

a witness called on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kehoe): Will you state your name?

A. Ralph E. Hedges.

Q. You are one of the Petitioners in this case?

A. Yes.

Q. And what was the year of your birth?

A. 1896.

Q. And you are the son of John T. and Kitty J. Hedges, is that correct? A. Yes.

Q. Where were you born?

A. Indianapolis, Indiana.

Q. And did you live with your parents during your childhood? A. Yes.

Q. Did you move to Washington in 1902?

A. Yes.

Q. And you lived where?

A. Near Yakima.

Q. And you lived continuously near Yakima thereafter? A. Yes.

Q. Your mother died in 1923; is that correct?

A. Yes.

Q. And your father in 1944? A. Yes.

Q. Was your father's estate probated in Yakima County? A. Yes.

Q. And did you file a claim in the Estate?

A. Yes.

(Testimony of Ralph E. Hedges.)

Q. And did you recover on that claim?

A. Yes.

Q. And what was the basis of that claim? What was the reason for the claim? What rights did you think that you had that had not been honored?

A. One-fourth of mother's estate.

Q. One-fourth of your mother's estate?

A. Yes.

Q. How did that come about in 1944? What property did you think you had a right to in that claim?

A. It was a part of my mother's.

Q. At the time of your father's death, when you filed a claim against his estate, what property did you claim was yours?

A. One-fourth of the Sunshine.

Q. One-fourth of the Sunshine?

A. Yes.

Q. Sunshine Mining Stock; is that correct?

A. Yes.

Q. Are you married, Mr. Hedges?

A. Yes.

Q. How long have you been married?

A. Twenty-nine years.

Q. Do you have any children?

A. I have two sons.

Q. What are their ages?

A. Twenty-six and twenty-three.

Q. And do you live in Seattle now?

A. Yes.

Q. How long have you lived here?

(Testimony of Ralph E. Hedges.)

A. About ten years.

Q. And do you recall where you worked from 1941 to 1944? A. Yes.

Q. It was in Seattle, was it? A. Yes.

Q. Where? A. Safeway.

Q. And what was your maximum monthly wage for the period 1941 to 1944?

A. $250.00 to $300.00.

Q. And did you have any appreciable outside income from 1941 to 1944? And by that I mean did you have any outside income outside of the Safeway income? A. No.

Q. And where did you live prior to 1941?

A. Yakima.

Q. For about how long have you lived there?

A. Twenty years.

Q. And were you working when you lived in Yakima? A. Yes.

Q. What was your maximum monthly wage while you worked in Yakima, as I take it, with various employers?

A. Well, my maximum was about $150.00.

Q. About $150.00 a month? A. Yes.

Q. And did you have any appreciable outside income, and by that I mean, more than $500.00 a year from other sources, other than from your work? A. No.

Mr. Kehoe: That is all, Your Honor.

Cross Examination

Q. (By Mr. Pigg): Mr. Hedges, included

(Testimony of Ralph E. Hedges.)

among the Exhibits already in evidence in this case are photostatic copies of several court records and documents, and among them is the document which describes the claim which you filed against your father's estate, the estate of John T. Hedges.

A. Yes.

Q. You are the same individual and person referred to in that claim? A. Yes.

Mr. Pigg: I think that is all, Your Honor. No, just one more question, if you please.

Q. (By Mr. Pigg): Also, among those papers and exhibits is a document described as a contract of settlement between Ralph E. Hedges and Jessie Beldon Hedges as executrix of the Estate of John T. Hedges, individual? A. Yes.

Q. You are the same Ralph E. Hedges referred to there? A. Yes.

Mr. Pigg: I think that is all, Your Honor.

The Court: That is all, Mr. Hedges.

(Witness excused.)

Mr. Hawkins: The Petitioner rests.

The Court: The Petitioner rests.

Mr. Pigg: At this time I would like to offer in evidence the income tax return of Ralph E. Hedges for the year 1944, as a Respondent's Exhibit D.

The Court: Admitted.

(The document above-referred to was received in evidence as Respondent's Exhibit D.)

Mr. Pigg: And the income tax return of Stanley Hedges Childress for the year 1944 as Respondent's E.

The Court: Admitted.

(The document above-referred to was received in evidence as Respondent's Exhibit E.)

Mr. Pigg: And as Respondent's F, the Estate Tax Return of John T. Hedges, dated February 1, 1944.

The Court: Admitted.

(The document above-referred to was received in evidence as Respondent's Exhibit F.)

Mr. Kehoe: We have no objection to these. We have agreed with Counsel in advance.

The Court: I understand.

Mr. Pigg: If the Court please, on Schedule L of Respondent's Exhibit F, being the Estate Tax Return of John T. Hedges, there are two items to be identified, each of which as to amounts is $82,289.00, and they refer to the two claims, one each by Ralph E. Hedges, and one by Stanley Hedges Childress, which have been under discussion here; and those returns, Your Honor, show there has been a deficiency in the Estate tax of $13,689.26. Counsel, as I understand it, stipulates that no part of the deficiency is based in any wise on any adjustments in respect to either of the items of $82,289.00 appearing in Schedule L, and that the two deductions there claimed on Schedule L were allowed as Claims by the Respondent.

Mr. Kehoe: That is right, Your Honor. No objection. The record will show that?

The Court: The record will show that.

Mr. Pigg: The Respondent rests.

The Court: The case stands submitted. I think you may file simultaneous briefs.

Mr. Hawkins: There are two separate cases, and I presume each of us will want to file briefs.

Mr. Kehoe: Counsel for Mr. Childress lives in Yakima, but we will try to avoid duplication as much as possible.

The Court: What time do you want?

Mr. Pigg: I would like to have not less than 60 days, and concurrent briefs.

The Court: Is that agreeable?

Mr. Hawkins: Yes.

The Court: Sixty days for the original briefs, simultaneously, and thirty days more for the reply.

(Whereupon, at 11:45 o'clock, p.m., October 9, 1951, the hearing was adjourned.)

[Endorsed]: T.C.U.S. Filed Nov. 15, 1951.

[Title of Tax Court and Causes Nos. 29288, 29469.]

FINDINGS OF FACT AND OPINION

Income — Trust — Fiduciary—Beneficiaries — Delayed Receipt—Sections 142, 161, 162.—A fiduciary held stock in his own name which he failed to disclose and have distributed to the beneficiaries as an asset of the estate of a decedent to which it belonged and which he was administering. The heirs were unaware that he held the stock. The fiduciary continued to hold the stock and received dividends on it as a fiduciary and was liable for tax on the dividends so that when the stock and dividends were

later turned over to the heirs they were not taxable in the year of receipt on the dividends for prior years.

Kenneth C. Hawkins, Esq., and A. R. Kehoe, Esq., for the petitioners.

John H. Pigg, Esq., for the respondent.

The Commissioner determined deficiencies and penalties under section 294 as follows:

	1944		1945
	Deficiency	Penalty	Deficiency
Ralph E. Hedges	$23,484.38	$10.61	$132.00
Stanley Hedges Childress	33,762.08		

The deficiency for 1945 is not contested. The issues for decision are whether $57,439 received by each petitioner in 1944 is taxable income.

FINDINGS OF FACT

The petitioners filed their income tax returns for 1944 with the collector of internal revenue for the district of Washington. Each used the cash receipts and disbursements method of reporting his income.

John T. Hedges and Kittie J. Hedges were married in 1888. They moved to Yakima, Washington, about 1902 and resided there until they died. They had two children, the petitioner, Ralph E. Hedges, born in 1896, and Ruth Hedges Childress who predeceased her mother and left as her only surviving issue the petitioner, Stanley Hedges Childress, born July 29, 1916. Kittie died intestate on March 23, 1923. John became her executor in October 1923.

The community property of John and Kittie, as

listed by him in the administration of Kittie's estate, had an appraised value of $36,429.17. A distribution of one-fourth of the assets to Ralph, one-fourth to Stanley, and one-half to John was ordered on October 4, 1924. John was awarded a fee of $1,200 as administrator of Kittie's estate and was discharged as administrator on October 4, 1924.

The community property of John and Kittie at the time of her death included 14,200 shares of stock of Sunshine Mining Company. Some of those shares were in Kittie's name but John had all shares transferred to his name shortly after Kittie died. John did not list any of the Sunshine Mining Company shares as assets or otherwise mention them in the administration of Kittie's estate. Ralph and Stanley were each entitled to 3,550 of those shares upon the death of Kittie as her heirs, and John was entitled to 7,100 of those shares as his portion of the community property of himself and Kittie.

John executed on January 12, 1924, what proved to be his last will, the first paragraph of which was as follows:

> Realizing that my son, Ralph E. Hedges, has or will come into possession of practically one-quarter of such estate as I have created, prior to the making of this, my Will, and is therefore suitably provided for, I hereby give and bequeath unto my said son Ralph, the sum of Five ($5.00) Dollars.

He left the remainder of his estate to Jessie Ames Belton, whom he married on April 5, 1924. John asked Jessie at the time he married her never to

let Ralph know that Kittie and John had owned the Sunshine Mining Company stock and said he did not have to declare that stock in the inventory of Kittie's estate because it had no value. John died on February 1, 1944, survived by Jessie and the two petitioners.

The following table shows the year, rate, and total for 3,550 shares of the dividends declared on Sunshine Mining Company stock:

Year	Per Share	Amount Attributable to 3,550 shares
1927	$0.08	$ 284.00
1928	0.12	426.00
1929	0.22	781.00
1930	0.16	568.00
1931	0.02	71.00
1932	0.10	355.00
1933	0.25	887.50
1934	0.68	2,414.00
1935	1.40	4,970.00
1936	2.25	7,987.50
1937	3.00	10,650.00
1938	2.20	7,810.00
1939	1.60	5,680.00
1940	1.60	5,680.00
1941	1.30	4,615.00
1942	.55	1,952.50
1943	.45	1,597.50
1944	.20	710.00
	Total	$57,439.00

The petitioners learned for the first time after the death of John that the community property of Kittie and John at the death of Kittie had included shares of Sunshine Mining Company stock and that

the number of those shares was 14,200. Each petitioner filed a claim against the estate of John setting forth the fact that John had not disclosed the ownership of the 14,200 shares of Sunshine Mining Company stock in the administration of Kittie's estate and had thereby deprived each of the petitioners of the 3,550 shares of that stock to which he was entitled in the distribution of that estate. They also set forth that dividends in the amount of $57,-439 had been paid on each block of 3,550 shares during the time it had stood in the name of John and each petitioner was entitled to have turned over to him 3,550 shares of the stock, $57,439 representing the dividends thereon, and 6 per cent interest on the dividends from the date of declaration.

John still held the stock at the time he died and his estate contained sufficient funds to make proper restitution to the two petitioners. Jessie, as executrix of John's estate, knew that the petitioners were entitled to the stock and the dividends and, with the approval of the Court, turned over in 1944 to each of the petitioners 3,550 shares of Sunshine Mining Company stock and cash or other property in the amount of $57,439 which the two petitioners agreed to accept in full settlement of the amounts due them.

Dividends on all of the shares of Sunshine Mining Company stock standing in the name of John were reported on his income tax returns for the years 1934 through 1943, inclusive, except that the record does not show whether or not they were reported on his return for 1936. The record does not

show whether or not John reported the dividends for the years prior to 1934.

Ralph paid legal expense of $21,000 in 1944 in connection with the recovery of the shares of stock and the $57,439 from the estate of John.

The Commissioner, in determining the deficiency against Ralph, added $42,780.67 to the income shown on the return and explained that $57,479 received in 1944 in settlement of the claim against the estate of John constituted taxable income and "the $21,000 of legal expenses incurred by you in 1944 was incurred in part for the recovery of capital and in part for the recovery of income and that deduction is allowable only to the percentage that $57,439.00 bears to $82,289.00, the total of income and capital recovered."

The Commissioner, in determining the deficiency against Stanley, added $57,439 to income with the explanation that it represented taxable income received in settlement of a claim filed against the estate of John.

All facts stipulated by the parties, including all joint exhibits, are incorporated herein by this reference.

OPINION

Murdock, Judge: The Commissioner argues that John properly reported the dividends since he received them under color of title and claim of right; they were not taxable to a trust ex maleficio or any other trust recognized as a taxpayer; and the petitioners are taxable in 1944 with the $57,439 which

they received, not as heirs of Kittie, but as creditors of John's estate under a claim, the gravamen of which was loss of profits, since under no sound theory could the dividends have been reported by or for them in the years of payment by the corporation. The petitioners argue that the dividends were taxable currently to a constructive trust of which John was trustee. They state that the tax which the Commissioner has already received on the dividends from John substantially exceeds that which would have been due if the income had been properly reported during those years either by a fiduciary or by the two petitioners whose income was much less than John's during those years. They point out that to pile up all of this income in the one taxable year 1944 would impose upon them a very high tax and would be an extreme hardship in view of the fact that they were entitled to receive this income over a long series of lower tax years during which their tax burdens, if any, would have been small, and the fault of John should not impose upon them the hardships inherent in the determination of the Commissioner.

John became the administrator of Kittie's estate and held title to the two blocks of stock while acting as fiduciary. The record does not show the value of that stock at the time Kittie died but obviously John thought it had some value because he was careful to conceal it from the lawful owners and to have it placed in his name. He knew it was community property. The probate court ordered distribution of Kittie's estate and discharge of the

administrator on October 4, 1924. That would have properly terminated the administration and settlement of her estate for all purposes had the administrator not intentionally omitted the stock from the list of assets subject to administration. He thereafter necessarily continued to hold the shares in a fiduciary capacity and there was no complete and legal settlement of Kittie's estate until the part thereof which belonged to these two petitioners was turned over to them in 1944 along with amounts equivalent to the dividends on the stock paid during the time when it was wrongfully withheld from their possession by John, the administrator of Kittie's estate.

Both parties agree that the determining factor in the petitioners' acquisition of the equivalent of the dividends is the basic nature of the claim upon which the recovery was made. The real basis for the petitioners' claims against the estate of John was the rights which they acquired as heirs of Kittie. John, during his lifetime, or a new administrator for Kittie's estate after his death, could have been required to distribute to the petitioners not only the stock but also funds equivalent to the dividends. The two petitioners, learning for the first time of their rights, asserted them as heirs of Kittie, they were not contested, and the property which John had been holding was turned over to its owners.

Section 142 requires "every fiduciary" to file a return if the gross or net income which he is to report exceeds stated amounts. Section 161(a)(3) imposes a tax upon "Income received by estates of

deceased persons during the period of administration or settlement of the estate". Section 162(c) allows the estate of a deceased person during the period of administration or settlement of the estate a deduction for the amount of the income of the estate "for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary".

The only question here is whether the entire amounts which the petitioners received in 1944 are taxable income to them for that year. If they had recovered interest on the dividends it would have been taxable to them in its entirety in 1944, and likewise if John had sold the stock and the petitioners had sued him for their loss of dividends on the stock, their recovery might have been taxable in its entirety in the year received because only then would they have had an unconditional, unqualified right to receive it. Cf. Swastika Oil & Gas Co. vs. Commissioner, 123 F. 2d 382, 384, cert. denied 317 U. S. 639. However, those things did not happen. John concealed from Kittie's heirs the fact that he held the stock and was receiving the dividends. The gravamen of the claim of the petitioners was not for loss of profits but was for the stock which belonged to them as heirs of Kittie and for the dividends received on that stock, both of which John, who was administrator of Kittie's estate, possessed at the time he died. Both John and his executrix knew and admitted that the stock and dividends be-

longed to the petitioners. They required John, through his estate, to account to them for what was already theirs.

Those dividends were taxable to some taxpayer when they were received. The petitioners were not the ones, however, since they used a cash method, they had not received the dividends, and they did not even know during those years of their rights to the stock or to the dividends. Regulations 111, section 29.161-1 provides that the period of administration or settlement of an estate is the time actually required to administer and settle the estate whether it is longer or shorter than the period specified in the local statute for settlements of estates. That regulation has been approved in a number of cases in some of which it was held that the "period of administration or settlement of the estate" of a deceased person for the purposes of sections 161(a)(3) and 162(c) may differ from the period of administration of the estate terminated by an order of the probate court. Walter A. Frederich, 2 T.C. 936, reversed 145 F. 2d 796; William C. Chick, 7 T.C. 1414, affirmed 166 F. 2d 337; Estate of W. G. Farrier, 15 T.C. 277; Josephine Stewart, 16 T.C. 1; Alma Williams, et al., 16 T.C. 893. The probate court in the present case would not have closed the administration and discharged John as administrator of Kittie's estate if it had known that he was holding Sunshine Mining Company stock belonging to the estate which he had not included in the administration of the estate. John actually received dividends on the stock in each year from 1927 until

1944, and if the Commissioner had had knowledge of the facts he could have taxed those dividends to John in a fiduciary capacity as they were received under his regulation and section 161(a)(3). No distribution of those dividends was made to the heirs in any taxable year except the year 1944. Thus, no deduction under section 162(c) was proper for any year except 1944. The dividends declared and paid in 1944 were actually distributed to the petitioners in that year and are deductible by the fiduciary and taxable to the petitioners for 1944. John, so far as the record shows, never filed any income tax returns as administrator of the estate of Kittie or as a trustee for the estate which would bar the Commissioner from collecting any taxes lawfully due from him as administrator or trustee of that estate. Since the dividends for years prior to 1944 were taxable to the fiduciary without deduction, they were not thereafter taxable to the petitioners when finally distributed to them. Elnora C. Haag, 19 B.T.A. 982, 990, affirmed 59 F. 2d 514; Commissioner vs. Owens, 78 F. 2d 768, 776.

Ralph has failed to show that the Commissioner's allocation of the attorney fee was improper.

Reviewed by the Court.

Decisions will be entered under Rule 50.

Hill, and Withey, JJ, concur in the result.

Tietjens, J., dissenting: The majority opinion apparently is based on the theory that John, de-

spite the fact that the probate court had discharged him as administrator and closed the administration and despite the fact that he had wrongfully had the stock transferred to his own name, had collected the dividends as his own thereafter and paid income tax thereon in his individual capacity, was, nevertheless, still a fiduciary within the meaning of sections 161 and 162 of the Code and that the period of administration of the estate still continued under Regulations 111, section 29.161-1. I think this theory is erroneous. It is appreciated that periods of administration may extend for purposes of the Regulations beyond the time the administration is closed by the appropriate court, for instance, in the case of administering after discovered assets. But, here, John was in no sense acting with reference to the stock on behalf of the estate or in its interest. He was really a wrongdoer in that respect. I do not think his actions extended the "period of administration". Aside from this theory it seems to me the case is governed by the principles stated in Virginia Hansen Vincent, 18 T.C. . . (No. 40) and the dividends disgorged to the petitioners and made available to them for the first time in 1944 should be taxed to them in that year.

Raum, J., agrees with this dissent.

[Title of Tax Court and Cause No. 29469.]

COMPUTATION BY PARTIES FOR ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the parties, to the Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Tax Court, without prejudice to the parties' rights to contest the correctness of the decision entered herein by the Tax Court, pursuant to the statutes in such cases made and provided.

/s/ KENNETH C. HAWKINS,
Attorney for Petitioner

/s/ CHARLES W. DAVIS, WHP,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent

AUDIT STATEMENT

Petitioner: Stanley Hedges Childress, 2602 Summitview, Yakima, Washington. Docket No. 29469.

Tax Liability for the Taxable Year Ended December 31, 1944:

Liability: None.

Liability Disclosed by Return: None.

Deficiency: None.

Overassessment: None.

Recomputation of tax liability prepared in accordance with the opinion of The Tax Court of the United States promulgated June 30, 1952.

Taxable Year Ending December 31, 1944

Schedule 1—Adjustments to Net Income

Net income as disclosed by the deficiency letter dated April 17, 1950	$57,477.02
As adjusted	538.02
Reduction	$56,939.00
Reduction:	
1. Elimination of other income	$57,439.00
Addition:	
2. Elimination of standard deduction	500.00
Reduction	$56,939.00

Schedule 2—Explanation of Adjustments

1. Since it has now been decided by The Tax Court of the United States that the sum of $57,439.00, representing cash and other property which was received by the petitioner in 1944 in settlement of a claim filed against the estate of John T. Hedges, does not constitute income taxable to the petitioner, such income is now eliminated.

2. Since by reason of adjustment 1 above the petitioner is not entitled to the standard deduction, such deduction is now disallowed.

Schedule 3—Computation of Tax

Adjusted gross income, schedule 1.....$ 538.02

Income tax liability .....$ None
Income tax liability disclosed by the return,
Original account No. 10-856022..... None

Deficiency or overassessment of income tax.$ None

[Endorsed]: T.C.U.S. Filed Aug. 14, 1952.

The Tax Court of the United States

Docket No. 29288

RALPH E. HEDGES, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

The parties filed an agreed computation on August 14, 1952, pursuant to the Court's Findings of Fact and Opinion promulgated June 30, 1952.

Therefore, it is

Ordered and Decided, that for the year 1944 there is a deficiency in income tax of $109.00 and a penalty under section 294 of $10.61; and for the year 1945 there is a deficiency in income tax of $132.00.

[Seal] /s/ J. E. MURDOCK,
Judge

Entered August 19, 1952.

Tax Court of the United States

Docket No. 29469

STANLEY HEDGES CHILDRESS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

The Parties filed an agreed computation on August 14, 1952, pursuant to the Court's Findings of Fact and Opinion promulgated June 30, 1952.

Therefore, it is

Ordered and Decided, that there is no deficiency in income tax for the year 1944.

[Seal] /s/ J. E. MURDOCK,
Judge

Entered August 19, 1952.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 29288

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

RALPH E. HEDGES,
Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States in this proceeding on August 19, 1952 "that for the year 1944 there is a deficiency in income tax of $109.00 and a penalty under section 294 of $10.61; * * *." This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Ralph E. Hedges (hereinafter referred to as the taxpayer), is an individual residing at 120 North 48th Street, Seattle, Washington. The taxpayer filed his Federal income tax return for the calendar year 1944, the taxable year here involved, with the Collector of Internal Revenue for the District of Washington.

Nature of Controversy

The sole question which was presented to and passed upon by The Tax Court of the United States concerns the taxability to the taxpayer of the sum of $57,439.00 received by him during the taxable year 1944 in disposition of the claim asserted by him against the estate of his deceased father. At the time of the death of Kittie J. Hedges, the taxpayer's mother, on March 23, 1923, the community property of John Hedges, her husband, and Kittie included 14,200 shares of stock of Sunshine Mining Company. Some of the shares were in Kittie's name but her husband, John, had all of the shares transferred to his name shortly after her death. None of the said shares was listed or mentioned by John in the administration of Kittie's estate. The taxpayer and his nephew, Stanley Hedges Childress, were each entitled to 3,550 of these shares upon Kittie's death, as her heirs, and John T. Hedges, the husband of Kittie and the father of the taxpayer, was entitled to 7,100 of the shares as his portion of the community property. John, who remarried after the death of Kittie, died on February 1, 1944, leaving the bulk of his estate to his second wife, Jessie Ames Belton.

Upon learning that the community property of Kittie and John, at the death of Kittie, had included the Sunshine Mining Company shares, the taxpayer and his nephew each filed a claim against John's estate for his share of the said stock, and $57,439.00 representing dividends paid thereon during the time the stock had stood in John's name.

Jessie, as executrix of John's estate, with the approval of the Court, turned over to the taxpayer in 1944 the 3,550 shares of Sunshine Mining Company stock and cash or other property in the amount of $57,439.00 which the taxpayer agreed to accept in full settlement of the amounts due him. The taxpayer not having returned as taxable income the $57,439.00 recovered by him, the Commissioner added such sum to the taxpayer's reported income less $14,658.33 representing an allocate portion of legal expenses amounting to $21,000.00 which were incurred by the taxpayer in recovering the stock and dividends.

The Tax Court of the United States disagreed with the Commissioner's determination and held that the taxpayer's father had held the shares and had received dividends thereon as a fiduciary and was liable for tax on the dividends so that when the stock and dividends were later turned over to the taxpayer, he, the taxpayer, was not taxable in the year of receipt on the dividends for prior years.

/s/ CHARLES S. LYON, C.A.R.,
Assistant Attorney General
/s/ CHARLES W. DAVIS, C.A.R.,
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner on Review

Of Counsel:
CHARLES E. LOWERY,
Special Attorney, Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed Nov. 12, 1952.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 29469

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

STANLEY HEDGES CHILDRESS,
Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States in this proceeding on August 19, 1952 "that there is no deficiency in income tax for the year 1944." This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Stanley Hedges Childress (hereinafter referred to as the taxpayer), is an individual residing at 2703 Palatine Avenue, Yakima, Washington. The taxpayer filed his Federal income tax return for the calendar year 1944, the taxable year here involved, with the Collector of Internal Revenue for the District of Washington.

Nature of Controversy

The sole question which was presented to and passed upon by The Tax Court of the United States concerns the taxability to the taxpayer of the sum of $57,439.00 received by him during the taxable year 1944 in disposition of the claim asserted by him against the estate of his deceased grandfather, John T. Hedges. At the time of the death of Kittie J. Hedges (the wife of John and the taxpayer's grandmother) on March 23, 1923, the community property of John and Kittie included 14,200 shares of stock of Sunshine Mining Company. Some of the shares were in Kittie's name but her husband, John, had all of the shares transferred to his name shortly after her death. None of the said shares was listed or mentioned by John in the administration of Kittie's estate. The taxpayer and his uncle, Ralph E. Hedges (son of Kittie), were each entitled to 3,550 of these shares upon Kittie's death, as her heirs, and John T. Hedges (the husband of Kittie and the grandfather of the taxpayer) was entitled to 7,100 of the shares as his portion of the community property. John, who remarried after the death of Kittie, died on February 1, 1944, leaving the bulk of his estate to his second wife, Jessie Ames Belton.

Upon learning that the community property of Kittie and John, at the death of Kittie, had included the Sunshine Mining Company shares, the taxpayer and his uncle each filed a claim against John's estate for his share of the said stock, and $57,439.00 representing dividends paid thereon dur-

ing the time the stock had stood in John's name. Jessie, as executrix of John's estate, with the approval of the Court, turned over to the taxpayer in 1944 the 3,550 shares of Sunshine Mining Company stock and cash or other property in the amount of $57,439.00 which the taxpayer agreed to accept in full settlement of the amounts due him. The taxpayer not having returned as taxable income the $57,439.00 recovered by him, the Commissioner added such sum to the taxpayer's reported income which adjustment gave rise to a deficiency in income tax determined by the Commissioner in the amount of $33,762.08.

The Tax Court of the United States disagreed with the Commissioner's determination and held that the taxpayer's grandfather had held the shares and had received dividends thereon as a fiduciary and was liable for tax on the dividends so that when the stock and dividends were later turned over to the taxpayer, he, the taxpayer, was not taxable in the year of receipt on the dividends for prior years.

/s/ CHARLES S. LYON, C.A.R.,
Assistant Attorney General
/s/ CHARLES W. DAVIS, C.A.R.,
Chief Counsel, Bureau of Internal Revenue
Attorneys for Petitioner on Review

Of Counsel:

CHARLES E. LOWERY,
Special Attorney, Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed Nov. 12, 1952.

[Title of U. S. Court of Appeals and Cause 29469.]

STATEMENT OF POINTS

Comes Now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by his attorneys, Charles S. Lyon, Assistant Attorney General, and Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In entering its decision "that there is no deficiency in income tax for the year 1944."

2. In failing and refusing to sustain the deficiency in tax determined by the Commissioner for the taxable year 1944.

3. In holding and deciding that the taxpayer did not receive taxable income in the amount of, to wit, $57,439 representing an amount equivalent to accumulated dividends on 3,550 shares of corporate stock previously withheld from him by his grandfather as part of the distributable assets of the estate of his deceased grandmother, which amount was paid to the taxpayer in 1944 by the executrix of the estate of the taxpayer's deceased grandfather (the second decedent) in connection with a creditor's claim filed by the taxpayer against his deceased grandfather's estate.

4. In failing and refusing to hold and decide that the taxpayer received taxable income in the amount of, to wit, $57,439 representing an amount equivalent to accumulated dividends on 3,550 shares of

corporate stock previously withheld from him by his grandfather as part of the distributable assets of the estate of his deceased grandmother, which amount was paid to the taxpayer in 1944 by the executrix of the estate of the taxpayer's deceased grandfather (the second decedent) in connection with a creditor's claim filed by the taxpayer against his deceased grandfather's estate.

5. In that its opinion and decision are not supported by, but are contrary to, its findings of fact.

6. In that its opinion and decision are not supported by, but are contrary to, the evidence.

7. In that its opinion and decision are contrary to law and the Commissioner's regulations.

/s/ CHARLES S. LYON, C.A.R.,
Assistant Attorney General
/s/ CHARLES W. DAVIS, C.A.R.,
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner on Review

Statement of Service attached.

[Endorsed]: T.C.U.S. Filed Jan. 26, 1953.

The Tax Court of the United States
Washington

[Title of Causes Nos. 29288, 29469.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 47, inclusive, constitute and are all of the original papers and proceedings, save for document number 27, which is a copy furnished by respondent and used by the Court in lieu of the original paper which was lost and has never been found, and with original exhibits (1-A through 3-C attached to the stipulation of facts, Petitioner's exhibits 4 through 8 and Respondent's exhibits D through F), admitted in evidence, on file in my office as the original and complete consolidated record in the proceedings before The Tax Court of the United States entitled: "Ralph E. Hedges, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 29288" and "Stanley Hedges Childress, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 29469" and in which the respondents in The Tax Court have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United

States, at Washington, in the District of Columbia, this 29th day of January, 1953.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 13700. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Ralph E. Hedges, Respondent; Commissioner of Internal Revenue, Petitioner, vs. Stanley Hedges Childress, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed: February 3, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,700

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

RALPH E. HEDGES and STANLEY HEDGES CHILDRESS,

Respondents.

DESIGNATION OF RECORD FOR PRINTING

The Commissioner, Petitioner in the above-entitled action, designates the following portions of the record, proceedings and evidence for printing:

Document No. 2—Docket entries No. 29469.

Document No. 11—Petition No. 29469.

Document No. 13—Answer No. 29469.

Document No. 19—Stipulation of facts but not Joint Exhibits 1-A through 3-C.

Document No. 20—The following testimony: (a) Jessie Bolton Dean; (b) Stanley Hedges Childress; (c) Ralph E. Hedges.

Document Nos. 31 and 34—Findings of Fact and Opinion.

Document Nos. 35 and 36—Decision No. 29469.

Document No. 39—Petition for Review No. 29469.

Decoument No. 45 — Statement of Points No. 29469.

Stipulation as to the pleadings, decision and

statement of points in Commissioner vs. Ralph E. Hedges, Tax Court Docket No. 29288 and as to the use of Exhibits which are not to be printed but considered on review.

This designation of record for printing.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General

[Endorsed]: Filed Feb. 28, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the parties in the above-entitled action as follows:

(1) That, subject to the approval of the Court, Commissioner vs. Ralph E. Hedges and Stanley Hedges Childress, Tax Court Docket Nos. 29288 and 29469, respectively, shall be consolidated for purposes of designating and printing the record, briefing, argument and decision.

(2) That, subject to the approval of the Court, the pleadings, decision and statement of points in Commissioner vs. Ralph E. Hedges, Tax Court Docket No. 29288 and Exhibits 1-A and 3-C (a part of Document 19 of the transcript of record) and F (a part of Document 21 of the trancript of record), which the Commissioner does not propose to include in the printed record for reasons hereinafter set

forth, are before this Court and may be referred to by the parties and their briefs.

Commissioner vs. Ralph E. Hedges and Stanley Hedges Childress, Tax Court Docket Nos. 29288 and 29469, respectively, involve substantially identical questions of law and fact on appeal and therefore to print the pleadings, decisions and statement of points for both cases would incur unnecessary costs. As for the exhibits, they are a part of the record which the parties desire the court to consider but are not being printed because they are exceedingly lengthy and consist of material most or all of which are pertinent only for the composite picture they reflect.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General,
Attorney for the Petitioner

/s/ KENNETH C. HAWKINS,
/s/ A. R. KEHOE,
Attorneys for the Respondent

So Ordered:

/s/ WM. DENMAN,
Chief Judge
/s/ WM. HEALY,
/s/ WALTER L. POPE,
United States Circuit Judges

[Endorsed]: Filed Mar. 2, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

Comes now Respondent Stanley Hedges Childress and designates the following portion of the record, proceedings and evidence for printing:

All of the record, proceedings and evidence not designated by the Commissioner, except the exhibits.

This designation of record for printing.

/s/ KENNETH C. HAWKINS,
/s/ THOMAS E. GRADY, JR.,
Attorneys for Respondent Stanley Hedges Childress

[Endorsed]: Filed Mar. 9, 1953. Paul P. O'Brien, Clerk.

No. 13700

In the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

RALPH E. HEDGES, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

STANLEY HEDGES CHILDRESS, PETITIONER

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
HELEN GOODNER,
DUDLEY J. GODFREY, JR.,
Special Assistants to the Attorney General.

INDEX

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 13700

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

RALPH E. HEDGES, RESPONDENT.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

STANLEY HEDGES CHILDRESS, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 50-61)[1] are reported at 18 T. C. 681.

JURISDICTION

The petitions for review filed by the Commissioner (R. 60-71) relate to asserted deficiencies in individual income taxes for the year 1944. Notices of deficiencies were mailed to the taxpayers on April 17, 1950. (R. 10-11.) The taxpayers filed petitions for redetermination with the Tax Court on June 26, 1950, and July 10,

[1] Since the facts in these cases are in all material respects the same, by stipulation (R. 77-78), only the necessary parts of the record in *Commissioner* v. *Stanley Hedges Childress* are included in the printed record.

1950 (R. 3-9), under the provisions of Section 272 of the Internal Revenue Code. The decisions of the Tax Court, which failed to sustain the Commissioner's deficiency determinations, were entered on August 14, 1952. (R. 64-65.) The cases were brought to this Court by petitions for review filed by the Commissioner on November 12, 1952. (R. 75.) The jurisdiction of this Court is invoked under Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

While serving as administrator of the estate of his first wife Kitty, John Hedges appropriated 7,100 shares of Sunshine Mining Company stock which would have, but for his wrongful conversion, passed to the taxpayers as heirs of Kitty. The question is:

Whether the Tax Court erred in holding that the $57,439 paid to each of the taxpayers by the executrix of John's estate as a substitute for dividends for the years 1927 to 1944, inclusive, erroneously paid to John was taxable income to them under Section 22(a) of the Internal Revenue Code in the year of receipt, 1944.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and Regulations are set forth in the Appendix, *infra*.

STATEMENT

The now pertinent facts, as found by the Tax Court (R. 51-55), are as follows:

The taxpayers filed their income tax returns for 1944 with the Collector of Internal Revenue for the District of Washington. Each used the cash receipts and disbursements method of reporting his income. (R. 51.)

John T. Hedges and Kitty J. Hedges were married in 1888. They moved to Yakima, Washington, about 1902, and resided there until they died. They had two children, the taxpayer, Ralph E. Hedges, born in 1896, and Ruth Hedges Childress, who predeceased her mother and left as her only surviving issue the taxpayer, Stanley Hedges Childress, born July 29, 1916. Kitty died intestate on March 23, 1923. John became her administrator in October, 1923. (R. 51.)

The community property of John and Kitty, as listed by him in the administration of Kitty's estate, had an appraised value of $36,429.17. A distribution of one-fourth of the assets to Ralph, one-fourth to Stanley, and one-half to John was ordered on October 4, 1924. John was awarded a fee of $1,200 as administrator of Kitty's estate and was discharged as administrator on October 4, 1924. (R. 51-52.)

The community property of John and Kitty at the time of her death included 14,200 shares of Sunshine Mining Company stock. Some of those shares were in Kitty's name, but John had all shares transferred to his name shortly after Kitty's death. John did not list any of the Sunshine Mining Company shares as assets or otherwise mention them in the administration of Kitty's estate. Ralph and Stanley were each entitled to 3,550 of those shares upon the death of Kitty as her heirs, and John was entitled to 7,100 of those shares as his portion of the community property. (R. 52.)

John executed on January 12, 1924, what proved to be his last will, the first paragraph of which was as follaws (R. 52.):

> Realizing that my son, Ralph E. Hedges, has or will come into possession of practically one-quarter

> of such estate as I have created, prior to the making of this, my Will, and is therefore suitably provided for, I hereby give and bequeath unto my said son Ralph, the sum of Five ($5.00) Dollars.

He left the remainder of his estate to Jessie Ames Belton, whom he married on April 5, 1924. John asked Jessie at the time he married her never to let Ralph know that Kitty and John had owned the Sunshine Mining Company stock and said he did not have to declare that stock in the inventory of Kitty's estate because it had no value. John died on February 1, 1944, survived by Jessie and the two taxpayers. (R. 52-53.)

The dividends attributable to 3,550 shares of the Sunshine Mining Company stock from 1927 to 1944, inclusive, aggregated $57,439. (R. 53.)

The taxpayers learned for the first time after the death of John that the community property of Kitty and John at the death of Kitty had included shares of Sunshine Mining Company stock and that the number of those shares was 14,200. Each taxpayer filed a claim against the estate of John, setting forth the fact that John had not disclosed the ownership of the 14,200 shares of Sunshine Mining Company stock in the administration of Kitty's estate and had thereby deprived each of the taxpayers of the 3,550 shares of that stock to which he was entitled in the distribution of that estate. They also set forth that dividends in the amount of $57,439 had been paid on each block of 3,550 shares during the time it had stood in the name of John and each taxpayer was entitled to have turned over to him 3,550 shares of the stock, $57,439 representing the dividends thereon, and six percent interest on the dividends from the date of declaration. (R. 54.)

John still held the stock at the time he died and his estate contained sufficient funds to make proper restitution to the two taxpayers. Jessie, as executrix of John's estate, knew that the taxpayers were entitled to the stock and the dividends and, with the approval of the Court, turned over in 1944 to each of the taxpayers 3,550 shares of Sunshine Mining Company stock and cash or other property in the amount of $57,439 which the two taxpayers agreed to accept in full settlement of the amounts due them. (R. 54.)

Dividends on all of the shares of Sunshine Mining Company stock standing in the name of John were reported on his income tax returns for the years 1934 through 1943, inclusive, except that the record does not show whether or not they were reported on his return for 1936. The record does not show whether or not John reported the dividends for the years prior to 1934. (R. 54-55.)

Ralph paid legal expenses of $21,000 in 1944 in connection with the recovery of the shares of stock and the $57,439 from the estate of John. (R. 55.)

The Commissioner, in determining the deficiency against Ralph, added $42,780.67 to the income shown on the return and explained that $57,439 received in 1944, in settlement of the claim against the estate of John, constituted taxable income and that (p. 55)—

> the $21,000 of legal expenses incurred by you in 1944 was incurred in part for the recovery of capital and in part for the recovery of income and that deduction is allowable only to the percentage that $57,439.00 bears to $82,289.00, the total of income and capital recovered.

The Commissioner, in determining the deficiency against Stanley, added $57,439 to income with the explanation that it represented taxable income received in settlement of a claim filed against the estate of John. (R. 55.)

The Tax Court, four judges dissenting, held that the $57,439 received by each of the taxpayers in satisfaction of his claim for dividends was not the receipt of taxable income in 1944 or any other year. (R. 60-62.)

STATEMENT OF POINTS TO BE URGED

The detailed statement of points filed by the Commissioner (R. 72-73) may be summarized as the following general proposition which will be the basis of our argument:

1. The Tax Court erred in failing to hold that the $57,439 which both taxpayers received in settlement of the claims they filed against the estate of John Hedges for dividends erroneously paid to John was taxable income to them in the year of receipt, 1944.

SUMMARY OF ARGUMENT

For tax purposes, the period of administration is, under Section 29.162-1 of Regulations 111, the "time actually required" to perform "the ordinary duties pertaining to administration." Among the "ordinary duties pertaining to administration" there is not a duty upon the administrator to seek redress from himself for breaches of his fiduciary duties. Therefore, contrary to the holding of the Tax Court, the period of administration of Kitty Hedges' estate was closed for tax purposes when John Hedges was discharged as administrator by the state court in 1944 though John had not obtained redress from himself for appropriating stock belonging

to the estate. Nor is a constructive trustee a fiduciary within the meaning of Sections 161 and 162 of the Code. Under no theory then were the dividends received by John taxable to him as a fiduciary in the years received.

It seems clear that the dividends from the stock were not taxable to John individually since he had no right to them and did not receive them with the knowledge and consent of the true owners, the taxpayers. However, even if they were taxable to him, it would not alter the fact that the amounts taxpayers received in 1944 as a substitute for dividends constituted taxable income to them in that year. The sums representing dividends were gain to the taxpayers on the cash basis in the year of receipt.

ARGUMENT

The $57,439 Paid To Both Taxpayers by the Executrix of the Estate of John Hedges in Satisfaction of Their Claims for Dividends Erroneously Paid To John Was Taxable Income To Them under Section 22(a) of the Internal Revenue Code in the Year of Receipt, 1944

The single question in this case is whether the $57,439 which both taxpayers recovered from the estate of John Hedges in satisfaction of their claims for the dividends received by John from stock which would have passed to the taxpayers but for his wrongful appropriation was, as we contend, taxable income under Section 22(a) of the Code, (Appendix, *infra*). The basis of the Tax Court's holding was that the period of administration of Kitty Hedges' estate was, under Section 29.162-1 of Regulations 111 (Appendix, *infra*),[2] still open as of

---

[2] In its opinion the Tax Court refers to Section 29.161-1 of Regulations 111. It is clear, however, that this is an error, that the Section of the Regulations which the Tax Court is referring to is Section 29.162-1.

February 1, 1944, when John Hedges, Kitty's husband and administrator of her estate, died; that John received the dividends from the wrongfully appropriated Sunshine Mining Company stock for the years 1927 through 1944 as a fiduciary under Section 161(a)(3) of the Code (Appendix, *infra*); and that since they were taxable to John in his fiduciary capacity and not deductible under Section 162(c) of the Code (Appendix, *infra*) except for 1944, they were not thereafter taxable to the taxpayers when finally distributed to them. (R. 59-60.) We shall show that the decision of the Tax Court is based upon an erroneous interpretation of Section 29.162-1 of Regulations 111 and that the settlement sums, insofar as they constituted a substitute for dividends, were taxable income to the taxpayers in the year of receipt, 1944.

Insofar as pertinent Section 29.162-1 of Regulations 111 provides:

> The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. If an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. * * *
>
> * * * * *

The Tax Court interpreted this section as meaning that the period of administration of Kitty Hedges' estate did

not close for tax purposes when her husband John, was discharged as administrator on October 4, 1924, even though all the ordinary duties of administration had been completed. (R. 59-60.) Obviously such was not within the contemplation of the Commissioner in drafting this Section of Regulations 111. The Regulations are not based upon the premise that administrators will breach their fiduciary obligations, and the rectification of a breach is not one of the "ordinary duties pertaining to administration" The "time actually required" to perform "the ordinary duties pertaining to administration," within the meaning of Section 29.162-1, does not include the time necessary for administrators to seek redress from themselves for breaches of their fiduciary obligations. The Regulations cannot reasonably be construed as providing for extension of the "period of administration" in the situation here, and the majority of the Tax Court erred in so interpreting it.

One situation contemplated by the Regulations is illustrated by *Chick* v. *Commissioner,* 166 F. 2d 337 (C.A. 1st), certiorari denied, 343 U.S. 845.[3] See also *Williams* v. *Commissioner,* 16 T.C. 893; *Stewart* v. *Commissioner,* 16 T.C. 1; *Roebling* v. *Commissioner,* 18 T.C. 788; *Brown* v. *Commissioner,* 19 T.C. 87. In the *Chick* case, *supra,* the administration of the estate was dry and sterile, without purpose (other than tax saving) as of the tax year in question. The administrators had simply failed to close the estate's account with the local probate court and obtain a discharge, and did so for the purpose of preserving the estate as an entity for tax purposes. As the court there pointed out (p. 341), it was in the interest of a uniform tax system that Congress

[3] Cf. *Frederick* v. *Commissioner,* 145 F. 2d 796 (C.A. 5th).

granted to the Commissioner the authority to determine that the period of administration had closed in that type of situation, thereby thwarting attempts by administrators or executors to continue it for tax purposes. And it concluded that the period of administration had ended, notwithstanding that the administrators had not been discharged.

In the instant case, not only had John T. Hedges performed all his "ordinary duties pertaining to administration" of the estate of his deceased wife, but he also had been discharged as administrator by the state court as of October 4, 1924. Thus, it is clear that under Section 29.162-1 of Regulations 111 the period of administration for tax purposes had terminated as of that date. It follows that John did not receive the dividends in question during the period of administration and, thus, that he was not taxable as administrator of his wife's estate under Sections 161 and 162 of the Code.

The taxpayers argued in the court below that John was a constructive trustee of the stock and dividends in question here. But even if he were a constructive trustee, he nevertheless would not be classified as a fiduciary for purposes of Sections 161 and 162 of the Code. In *Stoddard* v. *Eaton,* 22 F. 2d 184 (Conn.), the court observed that Congress did not use the word "trust" in Section 219 of the early Revenue Acts (the precursors of Sections 161 and 162 of the Internal Revenue Code) as comprehending every type of trust "recognized in equity." Commenting on this fact, the court said (p. 186-187):

> A trust ex maleficio, a resulting trust, or a constructive trust are examples of trusts which do not fit into the frame of the statute. A trust, as therein

understood, is not only an express trust, but a genuine trust transaction. A revenue statute does not address itself to fictions.

* * * * *

See also *Estate of Peck* v. *Commissioner,* 15 T.C. 788, 796; *Prudence Miller Trust* v. *Commissioner,* 7 T.C. 1245. Thus, under no theory were the dividends in question taxable to John T. Hedges as a *fiduciary* for purposes of Sections 161 and 162 of the Code.

It seems plain that the dividends paid to John were not properly taxable to him as an individual although he did in fact pay tax on them in some of the years that he received them. The dividends were not his and he had no legal right whatever to them. He did not receive them with the taxpayers' knowledge or consent, either freely given or enforced. Thus, John's position was essentially the same as that of Wilcox, in *Commissioner* v. *Wilcox,* 327 U.S. 404, who embezzled money without the consent of the owner and who was held not taxable upon it. Like Wilcox, John too was a wrongdoer, a tort-feasor, who not only was under an unqualified duty or obligation to pay over the money to another, but had no semblance of a bona fide claim of right to the money. In *Rutkin* v. *United States,* 343 U.S. 139, rehearing denied, 343 U.S. 952, the Supreme Court held that one who extorted money from another was taxable on it. The *Wilcox* case, *supra,* was limited to its facts (p. 138) and it was pointed out (p. 138) that the *Rutkin* issue was whether the money extorted from a victim with his consent induced solely by harassing demands and threats of violence was taxable income under Section 22(a). Thus, the majority of the Court appears to have distinguished the two cases on the basis of whether the money wrong-

fully obtained was gotten from the true owner with his knowledge and involuntary consent. Here, as already shown, taxpayers neither knew of, nor gave their consent to, the appropriation or "embezzlement" of their dividends, and, accordingly, we think that *Wilcox* should be controlling and that John was not properly taxable on the dividends.

But even if the view were to be taken that the dividends were properly taxable to John, that still would not alter the fact that the amounts taxpayers received in 1944 constituted income to them in that year. What taxpayers received from the estate of John, aside from the stock itself, which the Commissioner has not attempted to tax, were sums in settlement of their claims—sums which were a substitute for the dividends which they would have received in prior years but for John's wrongful action.[4] The sums were thus gain to taxpayers on which they paid no tax and on which they were not taxable at any previous time. They were on a cash receipts basis (R. 51) and in previous years had not only not received the dividends but were not even aware that they had a claim to them.

That they were taxable on the amounts representing dividends in 1944, the year in which they were received, follows from *United States* v. *Safety Car Heating Co.*, 297 U.S. 88. In that case, the taxpayer sued for infringement of a patent and ultimately recovered profits received by the infringer during the period of infringement. The Supreme Court held that the profits constituted taxable income in 1925, the year taxpayer's right to receive them first accrued, even though the profits

[4] The Tax Court stated in its opinion (R. 58) that taxpayers' claims were "for the stock which belonged to them as heirs of Kitty and for the dividends received on that stock * * *."

were actually earned in prior years. Similarly, in *H. Liebes & Co.* v. *Commissioner,* 90 F. 2d 932, this Court held that sums recovered by a taxpayer representing profits of 1891, 1892, and 1893 constituted taxable income in the year of receipt, the fiscal year ended January 1, 1930, if the taxpayer was on the cash basis, and, if on the accrual basis in the year of accrual, which also was the fiscal year 1930. See also *Hort* v. *Commissioner,* 313 U.S. 28; *Mathey* v. *Commissioner,* 177 F. 2d 259 (C.A. 1st); *Durkee* v. *Commissioner,* 162 F. 2d 184 (C.A. 6th). If sums representing profits of prior years are taxable to the one who had the right to them in the year when his right to the profits first became fixed, if on the accrual basis, or when the profits were received if on the cash basis, it must follow *a fortiori* here that the amounts representing dividends of prior years are taxable to these taxpayers on the cash basis in the year they actually received them.

The fact that John included some of the dividends here in question in his income in the years in which he received them does not relieve the taxpayers of paying tax on the income realized by them. John's payment of tax as to part of the dividends was in no sense a payment of tax on behalf of the taxpayers. Even if John was properly taxable on the dividends it would have been because he realized economic value from them. (*Rutkin, supra,* p. 137.) The tax paid by virtue of one person's economic gain is, however, no substitute for the tax due from another person on his gain. It often happens that tax is paid by different persons on the same amounts, such as on the income of a corporation distributed to its stockholders as dividends. It follows, therefore, that when the taxpayers in the instant case recover sums

which were the equivalent of dividends erroneously paid to John over a seventeen-year period, they were taxable to them in the year of receipt, 1944.

CONCLUSION

In view of the foregoing, the judgment of the Tax Court should be reversed.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
HELEN GOODNER,
DUDLEY J. GODFREY, JR.,
Special Assistants to the Attorney General.

JULY 1953.

APPENDIX

INTERNAL REVENUE CODE:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so emplpoyed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1946 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) [As amended by Section 114, Revenue Act of of 1941, c. 412, 55 Stat. 687, and Section 134 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death.

* * * * *

(26 U.S.C. 1946 ed., Sec. 42.)

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

* * * * *

(26 U.S.C. 1946 ed., Sec. 161.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(b) [As amended by Section 111 (b) of the Revenue Act of 1942, *supra*] There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estates, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduc-

tion shall be included in computing the net income of the legatee, heir or beneficiary.

* * * * *

(26 U.S.C. 1946 ed., Sec. 162.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.42-1. *When Included In Gross Income.* —(*a*) *In general.*—Except as otherwise provided in section 42, gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. * * * If a person sues in one year on a pecuniary claim or for property, and money or property is recovered on a judgment therefor in a later year, income is realized in the later year, assuming that the money or property would have been income in the earlier year if then received. This is true of a recovery for patent infringement. * * *

Sec. 29.162-1. *Income of Estates and Trusts.*— * * *

The income of an estate of a deceased person, as dealt with in the Internal Revenue Code, is therein described as received by the estate during the period of administration or settlement thereof. The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose,

whether longer or shorter than the period specified in the local statute for the settlement of estates. If an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. * * *

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 284169 79

No. 13700

In the
United States Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

RALPH E. HEDGES, *Respondent.*

COMMISSONER OF INTERNAL REVENUE, *Petitioner,*

vs.

STANLEY HEDGES CHILDRESS, *Respondent.*

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT, RALPH E. HEDGES

JONES, BIRDSEYE & GREY,
A. R. KEHOE
Counsel for Taxpayer, Ralph E. Hedges.

610 Colman Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 13700

In the
United States Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

RALPH E. HEDGES, *Respondent.*

COMMISSONER OF INTERNAL REVENUE, *Petitioner,*

vs.

STANLEY HEDGES CHILDRESS, *Respondent.*

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT, RALPH E. HEDGES

JONES, BIRDSEYE & GREY,
A. R. KEHOE
Counsel for Taxpayer, Ralph E. Hedges.

610 Colman Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

REGULATIONS

STATUTES

In the

United States Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. RALPH E. HEDGES, *Respondent.*	No. 13700
COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. STANLEY HEDGES CHILDRESS, *Respondent.*	

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT, RALPH E. HEDGES

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 50-61) are reported at 18 T.C. 681.

JURISDICTION

On April 17, 1950, the petitioner, Commissioner of Internal Revenue (hereinafter referred to as "Commissioner"), mailed to respondents (hereinafter referred to as "Taxpayers"), notices of deficiencies in income taxes for the year 1944, for each taxpayer (R. 10-11). The taxpayers filed petitions for redetermination with the Tax Court on June 26, 1950, and July 10, 1950 (R. 3-9), under the provisions of section 272 of

the Internal Revenue Code. The petitions were heard on October 9, 1951, in a consolidated proceeding, and the Tax Court entered its decision on August 19, 1952 (R. 64-65). The cases were brought to this court by the petitions for review filed by the Commissioner on November 12, 1952. The jurisdiction of this court rests upon Section 1141 of the Internal Revenue Code as amended by Section 36 of the Act of June 25, 1948.

STATEMENT

There is no real controversy in this case as far as the facts are concerned, and the Commissioner's statement of the case is accurate, except for his indication that four Judges of the Tax Court dissented in the Tax Court's decision. Actually, two judges concurred in the result and two judges dissented (R. 60 and 61).

SUMMARY OF ARGUMENT

The position of taxpayers in this case is that the father, John T. Hedges, held the title to the 7100 shares of Sunshine Mining Company stock for the period 1923 to 1944 in a fiduciary capacity and that John T. Hedges was taxable in that capacity on the dividends declared and paid on the Sunshine Mining Company stock as they were paid during that period. The recovery of those dividends by taxpayers in 1944 was not taxable income except to the extent of the dividends actually paid in 1944, a matter of $710.00 for each taxpayer (R. 53). The dividends had been paid out over a period of years beginning in 1927 and were taxable income in the years in which they were paid, and were not taxable income to anyone in 1944 except as indicated.

As a matter of equity, the Commissioner has not been deprived of revenue because John T. Hedges paid the tax currently on these dividends, as though they were a proper part of his own income at a higher rate than would have been applicable had the fiduciary capacity been disclosed to the Commissioner. As a further matter of equity, it is clear that had these dividends been turned over to the taxpayer as they were paid, they would have had little or no income tax to pay on them because their earnings from other sources were modest, and each had exemptions that would have offset tax liability in most of the years involved.

ARGUMENT

The Tax Court held that John T. Hedges became the administrator of Kittie J. Hedges' estate, and held title to the 7100 shares of stock of Sunshine Mining Company, while acting as a fiduciary; that the probate court ordered distribution of Kittie's estate and discharge of the administrator on October 4, 1924, and that would have probably terminated the administration and settlement of her estate for all purposes had John T. Hedges not intentionally omitted the 7100 shares of stock from the list of assets subject to administration. The Tax Court held that thereafter John T. Hedges necessarily continued to hold the shares in a fiduciary capacity and there was no complete and legal settlement of Kittie's estate until the part thereof which belonged to these taxpayers was turned over to them in 1944, along with amounts equivalent to the dividends on the stock paid during the time it was withheld from their possession by John T. Hedges, the ad-

ministrator of Kittie's estate. The Tax Court held that these dividends were taxable to some taxpayer when they were received, and that actually that taxpayer was John T. Hedges in his fiduciary capacity. The Tax Court finally held that these amounts were not taxable to the taxpayers when turned over to them in 1944 except to the extent of the dividends actually paid in 1944 under the provisions of section 162 (d) of the Internal Revenue Code. Under that section of the Code, the only income that could be taxable to the taxpayers in the year 1944 would be the amount of the dividends paid on the Sunshine Mining Company stock during the twelve month period preceding August 8, 1944, the date the stock and the back dividends were received from the estate of John T. Hedges. The decision of the Tax Court was entirely correct.

To get a proper understanding of the fiduciary relationship of John T. Hedges in this matter, it is necessary to examine the laws of descent and probate of the State of Washington. There has been no question of the community nature of the Sunshine Mining stock as of the time of Kittie J. Hedges' death. In any event, under Washington law, this stock would have been community property. Any property acquired by either spouse during the existence of a community is presumed to be community property of the spouses, unless it is acquired by gift or devise or descent. *Union Savings & Trust Company v. Manney,* 101 Wash. 274 at 279, 172 Pac. 251.

Under the laws of descent of the State of Washington, in the absence of testamentary disposition, the com-

munity interest of a deceased spouse goes to the children of such spouse in equal shares. Revised Code of Washington, Section 11.04.050.

Under the probate laws of the State of Washington, all of the community property is subject to administration in the estate of a decedent. This includes the community interest of the survivor as well as the community interest of the decedent.

Title to the property vests in the executor or administrator, even as against heirs, or devisees or the surviving spouse of the decedent. The Washington Supreme Court in the case of *Bishop v. Locke,* 92 Wash. 90 at page 92, 158 Pac. 997, said:

> "It is the settled law of this state that executors and administrators are entitled to the possession and control of the property, both real and personal, of estates while being administered by them, as against heirs and devisees as well as all other persons."

See also:

> *In re Turner's Estate,* 191 Wash. 145 at 148, 67 P.(2d) 320.

This court has recognized that executors or administrators are entitled to the possession and control of the property under Washington probate law in the case of *Commissioner v. Larson,* 131 F.(2d) 85.

A careful analysis of this case shows that John T. Hedges simply failed to distribute all of the property of the estate of Kittie J. Hedges prior to his death. At the time of his death, there remained the Sunshine Mining Company stock and the dividends paid thereon during the period from 1923 to 1944. This property con-

stituted an undistributed portion of the property of the estate of Kittie J. Hedges, deceased. Section 11.76.250 of the Revised Code of Washington, and its counterpart, Section 1150 of Remington's Revised Statutes of Washington, which was passed in 1917, provides:

> "A final settlement of the estate shall not prevent a subsequent issuance of letters of administration should other property of the estate be discovered, or if it should become necessary and proper from any cause that letters should be again issued."

It is quite clear that taxpayers would have had an action under the above section of the Washington probate law to have the estate of Kittie J. Hedges reopened in 1944, have letters of administration reissued, and the administrator so appointed could then have instituted an action against the estate of John T. Hedges for the 7100 shares of Sunshine Mining Company stock and the dividends paid thereon for the period 1923 to 1944, and the estate of Kittie J. Hedges could then have been again closed and distribution made to the taxpayers herein of their rightful shares in that estate. From a practical standpoint, the same result was accomplished here by the taxpayers filing claims against the estate of John T. Hedges and securing the 7100 shares of Sunshine Mining Company stock and the dividends paid thereon during the period 1923 to 1944, through settlement of those claims.

It would appear that the interests of the taxpayers in this case in the Sunshine Mining stock and the dividends are defined in the case of *Chellew v. White,* 127

Wash. 382, 221 Pac. 3. That case involved the estate of Samuel Chellew, deceased. The decedent left a will leaving the residue of his property to S. C. White, as Trustee and Executor, to be handled and used "as they deem best and to whom they may decide best for the use of orphans and widows whose homes are in the two parishes of St. Ives and Towednack, England, to be expended by them for the relief of worthy orphans and widows of the War with Germany." S. C. White qualified as Executor of the estate and began the administration. The administration was completed and S. C. White, as executor, filed his final account and the property was distributed to S. C. White in trust for use by him as directed by the terms of the Will of Samuel Chellew. S. C. White died the year following the completion of the administration of the estate of Samuel Chellew. His widow, Fannie E. White, filed a petition for her appointment as administratrix *de bonis non* of the estate of Samuel Chellew alleging that there was a certain bank account in a bank in England which had been established by S. C. White to be distributed under the terms of the trust of the will of Samuel Chellew; that this money had not been expended and it was necessary that she be appointed as administratrix *de bonis non* of the estate of Samuel Chellew so that these funds could be administered. The Chellew case involved an action by an heir to establish his inheritance right in the property formerly being administered in the trust by S. C. White, the heir alleging in effect that the administration of the trust terminated on the death of the trustee, S. C. White and that the property reverted to

the heirs of the original decedent, Samuel Chellew. The court said at page 396:

> "Contention is made that the right of appellant to have the trust property remaining in the hands of S. C. White undistributed by him at the time of his death, has been finally adjudicated against appellant by the former decree of distribution entered in the probate proceedings, wherein that property was distributed to S. C. White as trustee for use as provided by the will of Samuel Chellew. That, as we view it, was only an adjudication of S. C. White's right to then receive that property, and at his discretion distribute it to certain persons of his choosing. He having failed to so distribute all of that property, and having died with some portion thereof remaining in his hands, as we must assume at this time, such remaining portion simply reverts to and becomes again an undistributed portion of the property of the estate of Samuel Chellew, Deceased. In other words, it is in the same condition with reference to the estate of Samuel Chellew as property of the estate discovered after settlement and distribution, and thereby rendered subject to further administration of the estate of Samuel Chellew, deceased. Section 1550, Rem. Comp. Stat. (F.C. §9812). We conclude that the former decree of distribution does not stand in the way of appellant asserting an inheritance right to this property and his right to the expeditious administration and distribution thereof."

The fact that the heirs of Kittie J. Hedges recovered directly from the estate of John T. Hedges, doesn't change the picture. They would have had the right to have the estate of Kittie J. Hedges reopened for fur-

ther administration of the non-disclosed assets. But they by-passed the available right and recovered directly from the estate of John T. Hedges. This short-cutting would appear to have been approved in the case of *Griffin v. Warburton,* 23 Wash. 231, 62 Pac. 765, where the court said:

> "But we cannot think a distribution of the property of an estate by an administrator to those to whom the property must ultimately go, made after the debts of the estate and the costs and charges of administration have been paid, is necessarily void because no decree of the court was made directing it. Under the statute as it now exists, the heirs upon the death of the ancestor become vested at once with the full property, subject only to the claims of the ancestor's creditors, and the necessary costs and charges of administration. They have the right of possession against all the world, except the right of the administrator while these claims are being adjusted and satisfied. But the administrator's right to the possession of the property of an estate is temporary, and is limited to the purposes of administration. When the claims of creditors are paid or barred, and the costs and charges of administration are satisfied, the estate is for all practical purposes fully administered upon, the right of possession in the administrator terminates, and the right of the heirs to the residue of the estate in his hands become absolute. The heirs are then entitled to have this residue delivered over to them as their own property, under the law; and it is made the duty of the administrator, by the statute, to surrender the property to them. This duty they can enforce by obtaining a decree of the court directing its performance. As such a decree, however, neither creates their title, nor

> their right of possession, to the property, a distribution made without it cannot be invalid. And especially is this so, where, as in the present case, the distributees are of adult age and otherwise competent to contract, and they agree with themselves and with the administrator upon the terms of distribution, and enter into the possession of the property after the distribution is made. The heirs but come into possession of their own property with the consent of the only person who can rightfully withhold possession from them, and they are not to be disturbed in such possession because of informalities in obtaining it."

The fiduciary relationship of John T. Hedges to these taxpayers is clearly indicated by the Washington Supreme Court in the case of *Ryan v. Plath,* 18 Wn.(2d) 839, 140 P.(2d) 968. The court said at page 860:

> "The relation of an administrator to the estate and to those whom he represents is at all times one of trust and confidence and in his dealings with the estate and its assets he acts throughout in a highly fiduciary capacity. He is required to act with utmost good faith in all of his actions and deeds."

The court went on to cite the language of the case of *Stewart v. Baldwin,* 86 Wash. 63, as follows:

> "An administrator stands in a fiduciary relation to those beneficially interested. He is subject to the universal rule that a Trustee is bound to do that which will best serve the interests which for the time are entrusted to his care. His own good faith is not enough."

Again at page 860 of the *Ryan* opinion, the court said:

> "Courts of equity have always scrutinized closely any transaction or series of transactions whereby an administrator or former administrator becomes

possessed, either directly or indirectly, of property formerly belonging to the estate."

If the position of John T. Hedges was not that of administrator of undistributed assets, he was at least a trustee under a constructive trust and very possibly a trustee under an express trust. Under Washington law the courts have cited with approval the principle that a person occupying a fiduciary relation who has property deposited with him on the strength of such relation, is to be dealt with as a trustee of an express trust. In the case of *Tucker v. Brown,* 199 Wash. 320 at page 330, 92 P.(2d) 221, the court said as follows:

> "An express trust is one created by the act of the parties; and, where a person has, or accepts, possession of money, promissory notes, or other personal property with the express or implied understanding that he is not to hold it as his own absolute property, but to hold and apply it for certain specified purposes, an express trust exists. *Farrell v. Mentzer,* 102 Wash. 629, 174 Pac. 482; 65 C.J. 295; *Allen v. Hendrick,* 104 Ore. 202, 206 Pac. 733.
>
> "A person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as a trustee of an express trust. *Moulden v. Train,* 199 Mo. App. 509, 204 S.W. 65."

In any event, this would be a constructive trust under Washington law. In the case of *In re Peterson's Estate,* 12 Wn.(2d) 686 at page 724, 123 P.(2d) 733, the Washington Supreme Court cited with approval the language of Mr. Justice Cardozo in *Beatty v. Guggenheim Exploration Co.,* 225 N.Y. 280, 122 N.E. 378, as follows:

> "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a Trustee."

Despite the Commissioner's reference to the language of *Stoddard v. Eaton,* 22 F.(2d) 184, a constructive trust has been recognized under the income tax laws in cases where extreme hardship would arise by failure to recognize equitable principles. See the case of *Knight Newspaper v. Commissioner,* 143 F.(2d) 1007, and the case of *Frederick S. Buggie,* 32 B.T.A. 581.

As indicated in the opening paragraph of the court's opinion in the Tax Court proceedings, the Commissioner in that proceedings relied heavily on the "claim of right theory." Under the "claim of right theory" a person who claims income as a matter of right pays the tax on it at the time the income is realized, and when he is forced to turn the income over to some other claimant, he is allowed a tax deduction in the year he gives the income up. The question then results as to whether or not the new claimant of the income is taxable on it in the year he gets it from one who claimed it as a matter of right, the first claimant, claiming a tax deduction in the year he turned the income over to the second claimant. In this case, it should be kept in mind that there was no income tax deduction claimed by John T. Hedges or his estate when the income on the Sunshine Mining Company stock was given up in 1944. It is true that the dividends on the Sunshine Mining Company stock were eliminated from the estate for estate

tax purposes, but the very fact that there was such elimination for estate tax purposes would clearly indicate that there had been no allowance for the deduction for income tax purposes for 1944. Even in the estate tax matter, the dividends were in no sense a deduction —they were simply an exclusion for property that belonged to someone else.

A claim of right situation was before the Tax Court just prior to the Hedges case. It involved facts that were somewhat like those involved here. The case is that of *Virginia H. Vincent,* 18 T.C. No. 40. In that case, the heir sued the corporation that had paid the dividends and recovered from the corporation. The matter had been before the Supreme Court of the State of California in the case of *Hansen v. Bear Film Co.,* 168 P.(2d) 946, and that court had held at page 956 that legal title was in the ancestor pursuant to a transfer by the decedent. In the Tax Court decision, the court commented on the fact that the stock had been held under a claim of right, and the Tax Court held that the heir was taxable on the income when she received it from the corporation that had wrongfully paid it out to another.

The Commissioner appears to have abandoned his claim of right theory in this case in that he indicated at page 11 of his brief that John T. Hedges "was a wrongdoer, a tort-feasor, who not only was under an unqualified duty or obligation to pay over the money to another, but had no semblance of a bona fide claim of right to the money."

The Commissioner had another theory in the Tax

Court proceeding which he is not pressing in this case, and that is that there was a debtor-creditor relationship between the John T. Hedges' estate and the taxpayers, as to the Sunshine Mining Company stock and the dividends paid thereon during the period 1923 to 1944. This theory is likewise mentioned in the opening paragraph of the Tax Court's opinion. As pointed out by the Tax Court in its opinion (R.58), the debtor-creditor theory simply isn't applicable in this case in law or in fact. The taxpayers filed their claim and recovered from John T. Hedges' estate on a fiduciary or trust basis and not on the basis of a debtor-creditor relationship. The Sunshine Mining stock and the dividends paid during the period 1923 to 1944 were not a deduction from the John T. Hedges estate for estate tax purposes, but were simply an exclusion on the basis of tracing specific assets which belonged to someone else and not on a basis of a debtor-creditor relationship. The claim itself shows that the primary object of the recovery was certain Sunshine Mining Company stock that had remained unchanged in form from the date of Kittie J. Hedges' death, and in addition, the exact amount of dividends paid on such stock from the date of Kittie J. Hedges' death to the date of John T. Hedges' death. It is true that there was an alternate claim for a money judgment in the event the stock was not available, but the settlement of the claim was on the basis of awarding to taxpayers stock that had originally been issued prior to the death of Kittie J. Hedges, which still remained in the hands of John T. Hedges and the exact amount of dividends paid on that stock from the date

of death of Kittie J. Hedges to the date of death of John T. Hedges.

A claim based on a debtor-creditor relationship has different legal incidents from that based on a trust or fiduciary relationship. This has been demonstrated in a number of Washington Supreme Court decisions. Under Washington law, a creditor's claim has to be filed in a decedent's estate within six months of the publishing of notice to creditors. If a claim is that of a creditor, a failure to file within that six months' period bars the claim forever. If, on the other hand, a claim is filed on a trust or fiduciary basis, then the filing need not be made within the six months' period. The case of *Davis v. Shepard,* 135 Wash. 124, 237 Pac. 21, is a leading case in Washington on this question. In that case the Washington Supreme Court cited with approval the following:

> "In Woerner's American Law of Administration, Vol. 2, §402, it is said:
>
> " 'As between a *cestui que trust* and his trustee the Statute of Limitations does not usually apply; and where a trustee dies, the trust fund if traceable in specie, constitutes no part of his estate, and is recoverable from the administrator by the successor in the trust, or person entitled to the fund, without any of the formalities prescribed for the establishment of a claim against the deceased, and hence the statute of non-claim does not apply to such an action, * * * But when such trust fund is confused with the trustee's own property, so that its identity is lost, the *cestui que trust,* or new trustee, as the case may be, stands in the position of a general creditor, to whom the statute of non-

claim applies with equal rigor as against other creditors.' ''

This distinction between a claim based on a trust relationship and a claim based on a debtor-creditor relationship has been discussed in other Washington Supreme Court cases. See *Tucker v. Brown,* 20 Wn.(2d) 740, 150 P.(2d) 104; *Smith v. Fitch,* 25 Wn.(2d) 619, 171 P.(2d) 682, and authorities cited therein.

In this court, the Commissioner advances the theory that "In the instant case, not only had John T. Hedges performed all of his 'ordinary duties pertaining to the administration' on the estate of his deceased wife, but he also had been discharged as administrator by the state court as of October 4, 1924. Thus, it is clear that under Section 29.162-1 of Regulations 111 the period for administration for tax purposes had terminated as of that date. It follows that John did not receive the dividends in question during the period of administration and, thus, that he was not taxable as the administrator of his wife's estate under sections 161 and 162 of the Code."

We think it has been shown that John T. Hedges did have the right to this dividend income as administrator of undisclosed assets of the Kittie J. Hedges estate, and as such, that he was taxable on these dividends when they were paid, and that taxpayers were not taxable on the dividends except to the extent of the dividend paid in the year 1944. In any event, we think the argument of the Commissioner has been answered by the reasoning of the Tax Court in its decision (R. 59). Someone was taxable on these dividends when they were paid out during the period 1923 to 1944. If as a

matter of fact, these dividends were not taxable to John T. Hedges as a fiduciary or in any other capacity, then they would have been taxable to taxpayers herein, but not during the year 1944, but during the years in which they were paid, 1923 to 1944. The Commissioner has cited cases in which the administration of an estate was dry and sterile and the courts recognized that there was no reason for keeping the administration open but in those cases, the courts have held that the tax is payable by the heirs at the time the income is earned, even though it is held by the estate beyond the normal time of administration and not distributed until later.

The Commissioner in this court next turns his attention to the proposition that where the claim is for loss of profits, the money or its equivalent recovered upon a judgment therefor in a later year, represents income realized in that year. In support of that proposition, he cites the cases of *United States v. Safety Car Heating Co.,* 297 U.S. 88; *H. Liebes & Co. v. Commissioner,* 90 F.(2d) 932; *Hort v. Commissioner,* 313 U.S. 28; *Mathey v. Commissioner,* 177 F.(2d) 259; and *Durkee v. Commissioner,* 162 F.(2d) 184. These cases for the most part were patent infringement cases that were contingent as to amounts and contested as to ownership until the later years. The court in the *H. Liebes & Co.* decision at page 937, clearly indicates that had the right existed unconditionally in the prior year and had the amount been certain, the amount recovered would have been taxable in the prior year. These cases were really cases of when income is properly accruable where a contingency exists and are distinguishable since here the unconditional right to receive the income in the

prior years was either that of the father as a fiduciary or that of taxpayers as heirs of the estate of Kittie J. Hedges, and the amount of the dividend and the amount of the stock was fixed and certain.

CONCLUSION

This court should keep in mind that there is only one question involved in this case and that is, whether or not taxpayers realized taxable income in 1944. It is the position of taxpayers that if taxable income was realized on these dividends, it was realized prior to 1944 except to the extent of the dividends actually paid in 1944, and as far as this proceeding is concerned it is unimportant whether the dividends were taxable to John T. Hedges as a fiduciary or to taxpayers. They were taxable when declared and paid. No one realized taxable income on these dividends in 1944 except to the extent they were declared and paid in 1944. The Tax Court, in a well reasoned opinion, reached a proper result, and their decision should be upheld.

Respectfully submitted,

JONES, BIRDSEYE & GREY,
A. R. KEHOE
Counsel for Taxpayer, Ralph E. Hedges

No. 13700

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

vs.

STANLEY HEDGES CHILDRESS, *Respondent*

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Brief for Respondent, Stanley Hedges Childress

MILTON P. SACKMANN
THOMAS E. GRADY, JR.
KENNETH C. HAWKINS
Attorneys for Respondent, Stanley Hedges Childress

311 Miller Building
Yakima, Washington

No. 13700

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

vs.

STANLEY HEDGES CHILDRESS, *Respondent*

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Brief for Respondent, Stanley Hedges Childress

MILTON P. SACKMANN
THOMAS E. GRADY, JR.
KENNETH C. HAWKINS
Attorneys for Respondent, Stanley Hedges Childress

311 Miller Building
Yakima, Washington

INDEX

TABLE OF CASES

OTHER AUTHORITIES

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. STANLEY HEDGES CHILDRESS, *Respondent.*	No. 13700

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT, STANLEY HEDGES CHILDRESS

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 50-61) are reported at 18 T. C. 681.

JURISDICTION

On April 17, 1750, the petitioner, Commissioner of Internal Revenue (hereinafter referred to as "Commissioner"), mailed to respondents (hereinafter referred to as "Taxpayers"), notices of deficiencies in income taxes for the year 1944, for each taxpayer (R. 10-11). The taxpayers filed petitions for redetermination with the Tax Court on June 26, 1950, and July 10, 1950 (R. 3-9), under the pro-

visions of section 272 of the Internal Revenue Code. The petitions were heard on October 9, 1951, in a consolidated proceeding, and the Tax Court entered its decision on August 19, 1952 (R. 64-65). The cases were brought to this court by the petitions for review filed by the Commissioner on November 12, 1952. The jurisdiction of this court rests upon Section 1141 of the Internal Revenue Code as amended by Section 36 of the Act of June 25, 1948.

STATEMENT

There is no real controversy in this case as far as the facts are concerned, and the Commissioner's statement of the case is accurate, except for his indication that four Judges of the Tax Court dissented in the Tax Court's decision. Actually, two judges concurred in the result and two judges dissented (R. 60 and 61).

SUMMARY OF ARGUMENT

John T. Hedges was a fiduciary whether as constructive trustee, executor or guardian, or by reason of the family relationship. When a fiduciary receives income he is required to pay taxes thereon in the year the income is received unless such income is distributable, in which event it is taxable to the beneficiary in the year in which the fiduciary receives the money. The taxpayers here paid the tax on the dividends declared by the Sunshine Mining Co., and received by the taxpayer in the year 1944. No claim is made by petitioner against the taxpayer for pre-

ceding years. The Government has already received more income tax from the dividends in question than it would have received had the stock and the dividends therefrom been turned over promptly and in accordance with law to the taxpayer at the time the taxpayer was entitled thereto. In fact, by reason of exemption and low income there would have been little or no tax due the commissioner had the dividends been turned over to the taxpayers in the year declared. It is neither justice or good law to impose upon the innocent victim of one who has taken property wrongfully, a large tax, at extremely high rates when that tax would not have been due particularly at such high rates had there been no conversion by the grandfather, of the Sunshine Mining Company stock.

RESPONDENT'S ARGUMENT IN SUPPORT OF DECISION OF THE TAX COURT OF THE UNITED STATES

While respondent, Stanley Hedges Childress, is filing a separate brief in these proceedings, in as much as the cases are consolidated and in order to avoid repetition, the respondent, Stanley Hedges Childress, concurs in and adopts the arguments presented in the brief of Ralph E. Hedges, also a respondent in these proceedings.

These cases consolidated pertain to proposed deficiencies in income taxes against each respondent separately for the calendar year of 1944. The essential facts in each case are substantially the same with the exception of one or two

matters hereinafter explained. Each respondent is represented by separate counsel.

In the Childress case the amount of the deficiency set aside by the Tax Court of the United States is the sum of $33,762.08 together with interest thereon from March 15, 1945, until paid (R. pp. 10-13).

Stanley Hedges Childress, respondent, is the grandson of John T. Hedges. John T. Hedges and Kitty J. Hedges were married April 25, 1888. Of this marriage there were two children, Ralph Hedges, one of respondents, and Ruth Hedges, later Ruth Hedges Childress, mother of Stanley Hedges Childress, respondent (R. 14). Kitty J. Hedges, grandmother of respondent, died intestate March 23, 1923 (R. p. 18). Prior to her death Kitty and John Hedges acquired certain shares of Sunshine Mining Stock which John Hedges did not list in the Kitty J. Hedges estate when the same was probated, but had said stock wrongfully reissued to him and transferred to him personally and kept it and used dividends therefrom as his own, although he was the administrator of the Kitty J. Hedges estate and should have listed the stock in those probate proceedings (R. pp. 14, 18-22).

Prior to the entry of the decree of distribution in the Kitty J. Hedges estate said John T. Hedges, grandfather of this respondent, was appointed guardian of the estate of Stanley Hedges Childress, the respondent, then a minor;

for the purpose of receiving and holding his (Stanley's) share of the Kitty J. Hedges estate, she having died without a will, and Stanley's mother having predeceased her (R. 24, Ex. 8). Said John T. Hedges again failed to list said Sunshine Mining Stock in these guardianship proceedings as he was required by law to do and during the period of said guardianship proceeding failed to list said stock or any dividend thereof (Ex. 8). The final decree in the guardianship proceedings was entered without the guardian said John T. Hedges, ever disclosing said Sunshine Mining Company Stock and without ever disclosing the receipt of dividends therefrom (Ex. 8). The record shows that John T. Hedges included said dividends in his own personal income tax returns and paid taxes thereon at a higher rate that had said dividends been paid directly to respondent as they should have been (Ex. 7, R. 34, 35).

Upon the death of John T. Hedges February 1, 1944, Ralph Hedges, one of respondents herein and Stanley Hedges Childress, respondent, filed claims against the John T. Hedges estate each claiming a ¼ interest in the Sunshine Mining stock held by Kitty and John T. Hedges at the time of her death and each claiming an amount equal to the dividends received thereon by John T. Hedges since Kitty Hedges' death plus interest (Ex. 2B(0)). These claims were not litigated but were settled out of court. Respondent Stanley Hedges Childress was allowed in settlement of his claim 3550 shares of Sunshine Mining Stock and

$57,439.00 in cash and real property in 1944 (Ex. 2B). Petitioner contends said sum of $57,439.00 represented taxable income to the respondent in the year 1944. Respondent contends that said sum is not taxable in 1944.

In addition to the arguments made by Ralph Hedges, the respondent, Stanley Hedges Childress, in his brief filed herein, wishes to stress two additional arguments, the latter of which is applicable only to Stanley Hedges Childress.

CONSTRUCTIVE TRUST

As indicated by counsel for respondent Ralph Hedges, the testimony of Jessie Belton Dean, formerly Hedges, clearly demonstrates that Hedges recognized that he wrongfully had taken, held and used property belonging to both respondents (R. 31-32). Why else would he exact a promise from Jessie not to tell Ralph about the Sunshine stock? He knew from Ralph's action in Kitty's estate that Ralph would insist on an immediate surrender of the stock. He knew he had to deliver assets of Kitty's estate to Ralph and Stanley; in fact, as guardian, he acknowledged that he received for Stanley, Stanley's share of the assets of Kitty's estate, that is, that portion of her estate he chose to set forth in the inventory. His transfer of the Sunshine stock to his own name, clearly, was a conversion, in contemplation of law. See 53 Am. Jur., Sec. 12.

Whenever there is a conversion, there follows a con-

structive trust. The wrongdoer is the constructive trustee. His victim becomes the beneficiary.

Thus, Bogert, Trusts and Trustees, Vol 3 (Part 1) Sections 476, 481:

> "If one has possession of personal property under such circumstances that appropriation of it to his own use may not make him a criminal but he will be guilty of the tort of conversion in using the property for his own benefit, the wronged person may charge the convertor as a constructive trustee of anything of which he becomes the owner by reason of a sale of the thing converted.
>
> * * *
>
> "There are frequent instances of bailees being made constructive trustees of the proceeds of converted property."
>
> * * *
>
> "A person who interferes with the estate of a deceased person or of a cestui que trust or an incompetent person may likewise be charged as a constructive trustee if he assumes the privilege of managing the estate and gets a property interest by virtue of such intermeddling."

In *Dominick v. Rhodes* (S. C. 1943), 24 SE (2d) 168, a father had appropriated his son's interest in the mother's estate—paralleling the case at bar. In impressing a constructive trust upon the assets in the father's hands the court said (p. 172):

> "It seems to us that this statement alone is sufficient to show that the law should apply and enforce a trust relationship as between the father and the son (there clearly being a confidential or fiduciary relationship between the parties by reason of the kinship and the surrounding circumstances), to the end that justice may be done."

So in the case at bar, John Hedges became constructive trustee and Ralph Hedges and Stanley Hedges Childress became beneficiaries, the corpus of the trust being their interest in the Sunshine Mining Company stock owned by the community composed of John T. and Kitty J. Hedges inherited by Stanley and Ralph under the laws of descent and distribution in the state of Washington (Rem. Rev. Stat., Sec. 1342).

As to Stanley Hedges Childress, the fiduciary character of the relationship is emphasized by the fact John T. Hedges was the duly appointed qualified and acting guardian of his estate, he being a minor, but failed to list the Sunshine stock or deliver same over on closing the guardianship (Ex. 8). As to respondent Stanley Hedges Childress the relationship is clearly not a fiction, but an express statutory trust.

It would appear that the case of *Hopkins v. Commissioner*, 41 B.T.A. 1292 is controlling here. There, in 1933, a court decree adjudicated taxpayer the owner of certain stock as of 1920 and awarded him the stock and the dividends earned thereon. In holding that taxpayer did not

thereby acquire in 1933 taxable income, the tax court said (p. 1297 et seq.):

"Consequently, in view of the provisions of the contract, and its construction by the Ohio court, it must be held that the petitioner was the owner of the shares from and after August 16, 1920. *Erie Railroad Co. v. Tompkins,* 309 U. S. 64. The decree does not purport to make the petitioner the owner of the shares from the time of the decree, but on the contrary, confirms his ownership from August 16, 1920.

"Since petitioner was at all times the owner of the stock, we pass to the question of the dividends.

"Under the statute, income is taxable to one on the cash basis in the year when received. Such is the general rule. (Sec. 42, Revenue Act of 1932; art. 331. Regulations 77. However, physical receipt by the taxpayer is not always necessary in order to sustain an application of the rule. There may be receipt by an agent, which is regarded as receipt by the principal, *Maryland Casualty Co. v. United States,* 251 U. S. 342; there may be constructive receipt, John A. Brender, 3 S.T.A. 231; Ella C. Leese, Executrix, 15 S.T.A. 169. As to dividends, 'there are different times at which it reasonably may be claimed the taxpayer receives them.' *Avery v. Commissioner,* 292 U. S. 210. Dividends on stock in trust received by the trustee and used by it to discharge debts of the owner are income to the owner. *Lucy v. Blumenthal,* 30 S.T.A. 591; affd. 296 U. S. 552.

* * *

"If it were to be said that the contract of August 16, 1920, made the Trust Co. a trustee for the petitioner, then the Trust Co. was under the duty of filing returns and reporting the distributions as they occurred, and its failure to do so can not now be charged to the petitioner.

"The decree of the court in 1923 did not create income. It merely declared ownership of the Buckeye stock in 1920 and required an accounting of the proceeds and avails of such stock. The income on the stock followed its ownership and receipt occurred in the preceding years. This is true of the cash as well as the other items comprised in the accounting. The decree did not cause conversion of assets into cash or make the cash income in 1933.

"Respondent's position, as above indicated, is primarily based on the ground of untaxed enrichment. If equitable consideration were to be taken into account, we could not fail to note that, though the action by Griffiths in reporting the dividends was entirely without legal sanction and wholly irregular, by reason of the fact that Griffiths' personal income was much greater than that of Hopkins, the Government probably was paid an amount of tax on account of the dividends much in excess of what it would have received had petitioner returned them properly and paid the tax in due course.

"The respondent seeks to fortify his position by citing various cases which hold that income received as the result of litigation is subject to taxation in the year in which the litigation is terminated. *However, in the case at bar we note that the action brought by the petitioner was for the purpose of compelling the return of property already owned, not for the adjudication of a claim.* As above indicated, the suit was a simple proceeding against Guardian for an accounting and to repossess property unlawfully withheld from the petitioner by that company. Thus, the cases relied on by the respondent are clearly distinguishable on facts.

"We conclude that no income was received by petitioner in 1933 as a result of the decree of the Ohio court, nor was there any capital gain."

The parallel to the case at bar is striking, indeed:

Here, as there, income tax was paid by the recipient of the dividends (John T. Hedges) each year as the dividends were received, at a higher rate than if the dividends had been paid directly to the taxpayer.

Here. as there, the decree allowing the claims of respondents did not create income, but merely declared and recognized respondents' ownership of the stock in 1923.

Here, as there the trustee "was under the duty of filing returns and reporting the distributions as they occurred, and it's failure to do so can not now be charged to the "respondents."

Also supporting respondent's contention, is the case of *Commissioner v. Owens.* 78 F2 768,, where the court stated (p. 776):

> "We must assume, in the absence of a contrary showing not here present, that the fiduciary returned and paid the tax thereon. *Whitcomb v. Kenderville,* 90 S. C. 384, 73 SE 775, 777.
>
> "The income tax laws do not contemplate that income shall be taxed twice, both against the fiduciary and also against the beneficiary. Therefore, when provision is made for taxation against the fiduciary and for payment of the tax by him, the government may not assert a tax against the beneficiary when the money is paid over to him. *Haag v. Commissioner,* 19 B.T.A. 982, 990.
>
> "We do not think it would alter the situation had the fiduciary failed to return and pay the tax, and had the

> government failed to enforce his liability so to do; but that question is not here presented."

See also Rabkin & Johnson, Income, Gift and Estate Taxation, Vol. 2, Sec. 54.06:

> "But where the beneficiary has a vested right to the income, such income is currently distributable. . . The intent of the statute is to insure that all of the trust's net income is taxed either to the trust or to he beneficiary *in the year the income is realized by the trust.*"

In the case at bar, the income in question was included in the returns of John Hedges, and the tax was paid at an even higher rate than had it been actually distributed, as John Hedges was in a higher bracket than either of the respondents; here, clearly the purpose and intent of the statute as stated by the above authority has been amply fulfilled.

Generally, trust income is attributable to the trustee, when the income, under the trust agreement, is not distributable to the beneficiary. When, however, it is distributable, it is taxable in the year acquired by the trust whether actually distributed or not. Thus, in *St. Louis Union Trust Co. v. United States,* 3 F. S. 650, it is said (p. 654):

> "A trustee is a taxable person under the statute. *Merchants' Loan & Trust Co. v. Smietanka,* 255 U. S. 509, 41 S. Ct. 386, 65 L. Ed. 751, 15 A.L.R. 1305. Under the statutes applicable to this case the income of a trust is taxable to the trustee except where the entire net

income is, under the terms of the trust, to be distributed currently to the beneficiaries and except where the trustee has discretion to distribute the entire income, and actually distributes it, to the beneficiaries, in which case the beneficiaries, and not the trustee, are taxable.

"Section 219 (b) of the Revenue Act of 1926 (26 USCA Sec. 960 note) provides in substance that, where the income is to be distributed currently and regularly, the fiduciary shall be allowed a deduction in computing the net income of the trust, but the amount of such income shall be included in computing the net income of each beneficiary, whether distributed to them or not. Where therefore, the entire net income of the trust is actually distributed to the beneficiary under the terms of the trust or where it is held for the purpose of being currently and regularly distributed to the beneficiaries, the beneficiaries alone are liable for the tax, but where, as in this case, the income from a trust has not been distributed or paid by the trustee to the beneficiaries, and is not held by the trustee to be currently and regularly distributed to the beneficiaries, the trustee is liable under the statute for the tax upon the income of the trust.

"The provision of the statute that the beneficiaries shall be liable for the tax where the trustee has discretion to distribute the entire income to them, and actually does so, does not, we think, apply to this case. The trustee did not distribute the income or any portion of it to the beneficiaries, and neither did it hold the income received from the trust for the purpose of currently and regularly distributing it to the beneficiaries. Moreover, the trustee had no discretion to distribute the income, but was required to carry out the terms of the trust.. In these circumstances, we think the trustee was properly taxed under the statute on the income received from the trust. *Jobes v. Crooks* (D.C.) 33 F. (2d) 1016; *Willcuts v. Ordway et al.* (C.C.A.) 19

F (2d) 917; *Blair v. Barton* (C.C.A.) 26 F. (2d) 765; and *Crocker et al. v. Nichols* (D.C.) 27 F. (2d) 596.

> "In Henn, Trustee, 8 B.T.A. 190, the trust provided for distribution of so much of the income accrued to minor beneficiaries as was necessary or advisable in the judgment of the trustee for their maintenance, care, and education, and for the accumulation of the balance. The United States Board of Tax Appeals held that the income distributed was not taxable to the fiduciary, but that the balance held for accumulation and further distribution was taxable to the trustee."

These general rules are predicated upon the express language of the statute. (26 U.S.C.A. 161; 26 U.S.C.A. 162). The statutory langauge apparently applies to all trusts, as there is no limitation of the application of the statute by its language to express trusts. Therefore, the foregoing rules should be applied here; and if they are, there is no tax liability bar, regardless of whether the dividends received by John T. Hedges are deemed distributable or not to the beneficiaries of the constructive trust, for only the year 1944 is here involved. The tax for the dividends declared by Sunshine and received by Stanley in 1944 were paid (Ex. E, R. 49).

If the dividends are deemed undistributable in John T. Hedges' hands or distributable at his discretion, then the liability to pay the tax fell on him—which obligation he actually assumed. See *State Sav. Loan & Trust Co. v. Commissioner,* 63 Fed. (2d) 482, where the court stated (p. 483, 4):

"Petitioner was taxed as trustee under a trust indenture created by one Gardner and his wife for the benefit of their nine grandchildren. The issues arise out of and are determined by a construction of the trust agreement. It is petitioner's contention (1) that the trust instrument created not one, but nine separate trusts; one for each of their nine grandchildren respectively, and (2) that petitioner, as trustee, was unqualifiedly required to pay over the income to the beneficiaries. The board held that but one trust had been created and that the income was taxable to the trustee because he was endowed with discretion as to distribution of the trust income to the beneficiaries.

"The Revenue Act of 1926, Sec. 219 (a), 26 USCA 960 note, provides that the tax shall be assessed upon income of property held in trust when such income may, in the discretion of the fiduciary, either be distributed to the beneficiaries or accumulated.

"The trustee made no distribution of income during 1926-1928, the years in question. Only one income tax return was filed for the trust in both 1926 and 1927, but nine separate returns were filed in 1928.

"Material portions of the trust indenture are set forth in the margin verbatim.

* * * * *

"The trustee was given discretion as to the distribution of the income.

* * * * *

"The order of the Board of Tax Appeals is affirmed."

If distributable, then it is taxable to the beneficiaries *in the year received by the trustee,* whether distributed or not. See *Malcom v. Commissioner,* 97 F2 381, p. 383):

"The state court's order of 1931 approving the renewal of the lease contained no provision or instructions as to the distribution of the annual consideration payments and the action taken by the trustees in treating this income as future rents was by agreement of the parties only. But this agreement or understanding between the parties cannot affect the obligation to pay income tax as the Board of Appeals has decided. The tax may be imposed on petitioner as beneficiary even though the income has not in fact been paid to her if it was distributable to her. *Defrabant v. Com'r.* 2 Cir., 90 F. 2d 433; *McCrery v. Com'r.*, 5 Cir., 69 F. 2d 688. The test is whether the income of the trust was currently distributable and therefore taxable to the beneficiary; *it is not the receipt of income but the present right to receive it that controls. Blair v. Com'r.*, 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465; *Freuler v. Helvering,* 291 U. S. 35, 54 S. Ct. 308, 78 L. Ed. 634."

The application of the usual trust rules to a constructive trust situation seems to have been made in the Hopkins case, (41 B.T.A. 1292) set out at length above.

Again this was done in *Reizenstein, trustee, v. Commissioner,* 9 B.T.A. 1184. There one Louis Reizenstein, after starting probate of his father's estate, took possession of the assets and carried on the business of his father for many years. In refusing to tax him for the other heirs' lawful share of the income from the business, the court said:

"In view of the case, it is not necessary to decide whether the petitioner was a trustee for the benefit of the legatees, or was acting as agent for them. If he was their agent it is clear that the income received was taxable to the legatees and not to him as contended by the petitioner. *Maryland Casualty Co. v. United States,* 251 U. S. 253. * * *

"If it be conceded for the sake of argument that he was acting in the capacity of trustee, as contended by the respondent he was acting for those whose interests were definitely fixed by the terms of the will. The legatees had the right to their respective shares. There were no contingent interests. The income was neither to be accumulated nor held for future distribution under the terms of the will but each of the legatees was entitled to his share of the income.

"The assets and income therefrom belonged to the petitioner and the beneficiaries. The petitioner received the income for and in behalf of himself and the beneficiaries; and in the absence of any agreement that it should be accumulated or held for future distribution, the legatees were entitled to it as it came in. In 1922, the brothers and sisters of Louis Reizenstein claimed their interests in the estate and their rights were not questioned by anyone. Louis at that time purchased the interest of each for the sum of $11,000, which obviously represented compensation for their respective shares or interests in the corpus and also the accumulated profits to which each was entitled.

"Under section 219 of the Revenue Acts of 1918 and 1921, the beneficiaries are taxable on the distributive shares of the income, whether distributed or not. Gideon N. Stioff, et al., Executors, 2 B.T.A. 1109; Florence M. Smith, Executrix, 5 B.T.A. 225. *Cf. Esty v. United States,* 63 Ct. Cls. 455; *MvCaughn v. Cirard Trust Co.,* (C.C.A. 3rd Cir.) 19 Fed. (2d) 218."

By the very nature of a constructive trust, the beneficiaries thereof, as the "beneficiaries" did in the Hopkins case (41 B.T.A. 1292) and in the Reizenstein case (9 B.T.A. 1184), have a present right to receive the dividends in the year actually received by the trustee. From the very mo-

ment of the conversion, the right to receive dividends exists. It is a present and vested right. Therefore, under the foregoing rules, these dividends were taxable to respondent in the year actually received by the constructive trustee, John T. Hedges, and are not taxable to the respondent in 1944.

Clearly, such a result is just and equitable. Not only has Petitioner received from John T. Hedges more tax than it would have had he properly listed the Sunshine stock in question in the Kitty Hedges Estate, instead of converting it to his own use, but also, to hold otherwise, petitioner is subjecting these dividends to an onerous double taxation, both in the hands of the wrongdoer, and in the hands of the victim. It hardly seems right that petitioner should take advantage of the wrongdoer's act of conversion, to impose upon his innocent victim a double tax of this kind, at the highest rates in the history of this country.

We again repeat:

> "The intent of the statute is to insure that all of the trust's net income is taxed either to the trust or to the beneficiary in the year the income is realized by the trust." *Rabkin v. Johnson, supra.*

This has already been accomplished by the payments made by John T. Hedges, and does not require the imposition of the proposed deficiency.

THE GUARDIAN IS OBLIGATED TO PAY THE INCOME TAX

At the time of the death of Kitty Hedges, Stanley Hedges Childress, the respondent here, was a minor. Prior to the distribution of her estate, John Hedges was appointed the guardian of his estate. The entire guardianship file is a matter of record here (Tr. p. 22, Ex. 8). No where in these proceedings did John Hedges report or disclose the Sunshine stock in question. Obviously, as guardian it was his duty to do so, and judging by the testimony of Jessie Belton Dean, he recognized that duty.

Under the law of the State of Washington, it is the duty of the guardian to pay taxes. Rem. Rev. Stat., Sec. 1575 (5) requires the guardian "to pay all just debts due from such ward." This had been construed in the case of *Burgest v. Caroline,* 31 Wash. 62, to include taxes.

In 39 C.J.S. 159 it is stated that it is the guardian's duty to pay taxes, and further authority for this general proposition is found in *Shurtleff v. Rite,* 4 NE 407, 140 Mass. 213. Until the delivery or surrender of the stock in question to the ward, it was, therefore, the duty of John T. Hedges to pay the income tax upon the income from his ward's Sunshine stock.

Supporting that contention is Reg. Sec. 29.161—1:

"A guardian . . . is a fiduciary . . . and as such is re-

quired *to make and file the return for his ward and to pay the tax . . .*"

Again, I.R.C. Sec. 51 (R):

"The statute imposes upon a guardian . . . the duty of filing a return whenever the taxpayer is unable to make his own return."

To the same effect, Rabkin & Johnson, Vol. 1, Sec. 1.06 (2).

If, as the foregoing authorities amply indicate, it is the guardian's duty to return and pay the tax, clearly it was John Hedges' duty to do so until the stock was actually turned over to the ward, the respondent here. Clearly the respondent was unable to make his own return; he was very young, and furthermore, had no knowledge whatever of the Sunshine stock or his interest in it until 1944. The obligation to pay the tax was on the guardian, therefore, and not the ward.

Again, we submit, respondent should not be subjected to the deficiency in question.

REPLY TO ARGUMENT OF PETITIONER

Petitioner asserts that respondent cannot rely upon the doctrine of Constructive Trusts. This doctrine is hardly a fiction, particularly under the facts of this case. Certainly the doctrine and its effects are so thoroughly established by the books as to be classed as a reality rather than a fiction. There is no court in any of the 48 states that would

refuse to apply the doctrine of constructive trust under the facts of this case. How can it be said then that it is a fiction?

Counsel relies upon the case of *Stoddard v. Eaton,* 22 F (2d) 184. In that case an express written trust agreement was entered into. Under its terms the trustor, the maker of the trust, was also the beneficiary. The trustor also retained the right to control the investment of the trust assets. He also reserved the right to revoke the trust at any time. And so although a written agreement was executed creating an express trust, in truth and in fact there was no true trust or actual trust created since all the incidents of ownership remained in the trustor. He retained the income, he retained the control over the assets and he retained the right to cancel the written document at any time. The District Court who rendered the decision in that case properly attributed the income from the so called trust assets to the trustor and properly gave the trustor the benefit of losses sustained by the trustee. *No constructive trust situation existed in that case.*

The language quoted by counsel on P. 10 of petitioner's brief was obviously unnecessary to the decision of that case. Certainly an examination of facts in that case will show that it is not authority for reversing the tax court here. As is said in 113 A.L.R. 458:

"And special statutory provisions have been enacted

taxing the settlor in respect of the income of various types of trusts (see the annotations referred to above, in 101 A.L.R. 397; 109 A.L.R. 1048; and 106 A.L.R. 798), in effect disregarding the trust entity as to trusts falling within their terms and making it unnecessary, in determining the tax in respect of such income to decide whether there is in fact a trust.

"It may be noted that a few of the cases cited in the present annotation were decided under Federal revenue acts before the enactment of such special provisions and involved revocable trusts or trusts of other types, the income of which, if they had arisen under the later acts, would have been taxable to the settlor under such provisions without the necessity of deciding whether there was in fact a trust."

Likewise, the other cases cited, *Estate of Peck v. Commissioner,* 15 T. C. 788, 796; and *Prudence Miller Trust v. Commissioner,* 7 T. C. 1245 do not deal with a constructive trust situation but with a situation parallel to that in the Eaton case. Again they are obviously not authorities for reversing the tax court here. (Other cases indicating that a constructive trust might arise to offer relief are *Knight Newspapers v. Helvering,* 143 F (2d) 1007, at 1011, and *F. S. Buggia,* 32 B.T.A. 581).

We also call attention to the fact that counsel completely overlooks the fact that John T. Hedges certainly was taxable as a fiduciary with respect to Stanley Hedges Childress, since he was Stanley's guardian.

Counsel next refers to the two cases of *Commissioner v. Wilcox,* 327 U. S. 404, and *Rutkin v. United States,* 343

U. S. 139, distinguishing the two cases by the proposition that money wrongfully obtained wtih the true owner's knowledge even though involuntarily, is taxable gain. (Rutkin), whereas money wrongfully obtained without knowledge is not taxable (Wilcox). It apparently is counsel's position that John T. Hedges was in the position of Wilcox and therefore not taxable for the money wrongfully obtained and the tax therefore should fall upon respondent, which we think is a non sequitor. Counsel, here, however, fails to recognize that petitioner does not seek to tax the Sunshine Mining Company stock turned over to the respondent in 1944, but seeks only to tax in respondent's hands the sum of $57,439.00 in cash and property paid over to respondent in 1944, which amount was equivalent to the dividends on the Sunshine Mining Company stock received by John T. Hedges.

Counsel urges that the Wilcox case is controlling, but the supreme court there stated, (*Commissioner v. Wilcox*, 327 U. S. 404):

> "The very essence of taxable income, as that concept is used in Para. 22 (a) is the accrual of some gain, profit or benefit to the taxpayer. This requirement of gain, of course, must be read in its statutory context. Not every benefit received by a taxpayer from his labor or investment necessarily renders him taxable. Nor is mere dominion over money or property decisive in all cases. In fact, no single, conclusive criterion has yet been found to determine in all situations what is a sufficient gain to support the imposition of an income

tax. No more can be said in general than that all relevant facts and circumstances must be considered. See Magill, Taxable Income (1945).

"For present purposes, however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of Para 22 (a). See *North American Oil Consolidated v. Burnet,* 286 U. S. 417, 424, 76 L ed 1197, 1200, 53 S Ct 613. Nor can taxable income accrue from the mere receipt of property or money which one is obliged to return or repay to the rightful owner, as in the case of a loan or credit. Taxable income may arise, to be sure, from the use or in connection with the use of such property. *Thus if the taxpayer uses the property himself so as to secure a gain or profit therefrom, he may be taxable to that extent.* And if the unconditional indebtedness is cancelled or retired taxable income may adhere, under certain circumstances, to the taxpayer. But apart from such factors the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Para. 22 (a)."

* * * * *

"It is obvious that the taxpayer in this instance, in embezzling the $12,748.60, received the money without any semblance of a bona fide claim of right. And he was at all times under an unqualified duty and obligation to repay the money to his employer. Under Nevada law the crime of embezzlement was complete whenever an appropriation was made; the employer was entitled to replevy the money as soon as it was appropriated or to have it summarily restored by a

magistrate. The employer, moreover, at all times held the taxpayer liable to return the full amount. The debtor-creditor relationship was definite and unconditional. All right, title and interest in the money rested with the employer. The taxpayer thus received no taxable income from the embezzlement."

It is therefore apparent that the Wilcox case is authority for the proposition that the dividends in question here properly were taxable to John.

Finally counsel relies upon the case of *United States v. Safety Car Heating Company,* 297 U. S. 88. That case involved an alleged infringement of a patent. After the infringement had been established by court proceedings, it was adjudicated that the taxpayer was liable for the profits earned during the period of infringement and that such profits were taxable in the year 1925, the year taxpayer's right to recover them first accrued. This case, of course, is readily distinguishable from the case at bar as the right to the Sunshine Mining Company stock and the right to receive the dividends thereof clearly accrued on the date of the death of Kitty J. Hedges in 1923, not when the claim was allowed in John T. Hedges estate. (See Hopkins 41 B.T.A. 1292). That right was also recognized by John T. Hedges as is evidenced by the testimony of Mrs. Dean. (R. p. 30).

In the *United States v. Safety Car Heating Co.* case, the taxpayer had no clear and unconditional right to the profits

until the infringement of the patent was established by court action. This distinction has previously been recognized by the tax court (see *Hopkins v. Commissioner,* 41 B.T.A. 1292 quoted at length above), of which the tax court says: *"However in the case at bar we note that the action brought by the petitioner was for the purpose of compelling the return of property already owned, not for an adjudication of a claim."*

The same distinction, we submit. applies to the Safety Car Heating Co. case. Counsel also relies upon *Hort v. Commissioner,* 313 U. S. 28; *Mathey v. Commissioner,* 177 F. 2d 259 (C.A. 1st); *Durkee v. Commissioner,* 162 F. 2d 184 (C.A. 6th). These cases are similarly distinguishable and are not authority contrary to the holding of the tax court here.

We note that in the Rutkin case the court says:

> " * * * it would be an extraordinary result to hold here that petitioner is to be tax free because his fraud was so transparent that it did not mislead his victim and his victim paid him the money because of fear instead of fraud."

So here it would be an extraordinary result that would permit the Government to recover a double tax upon these dividends—and thus more than double the amount it should have received—by taking advantage of the wrongdoing of John and thereby visiting at extremely high progressive rates the tax upon the wrongdoer's victims, Stanley and Ralph.

Counsel argues that because a stock holder of the corporation pays tax upon dividends received even though the corporation also pays a tax upon its proceeds, that therefore, the tax payers in the instant case should not complain. We submit that the situation is wholly different. Here in truth there are three taxes—one paid by Sunshine, one by John T. Hedges and one by Stanley and Ralph, if petitioner is correct—upon the same earnings.

We respectfully submit that the decision of the tax court here is both good law and is eminently fair and just.

MILTON P. SACKMANN
THOMAS E. GRADY, JR.
KENNETH C. HAWKINS
Attorneys for Respondent,
Stanley Hedges Childress

No. 13701

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE WILLIAM PICKARD and WILLIAM HERSHEL CAGLE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-20-53

No. 13701

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE WILLIAM PICKARD and WILLIAM HERSHEL CAGLE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-20-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JAMES W. JOHNSON, JR.,
United States Attorney,

Post Office Building,
Reno, Nevada,

For the Appellant.

JOHN W. BONNER,

Boggs Building,
319 Fremont Street,
Las Vegas, Nevada;

D. FRANCIS HORSEY,

425 Fremont Street,
Las Vegas, Nevada,

For the Appellees.

In the United States District Court
for the District of Nevada

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE WILLIAM PICKARD and WILLIAM HERSHEL CAGLE,

Defendants.

INFORMATION FOR VIOLATION
Sec. 641, T. 18, U. S. C.

The United States Attorney Charges:

Count I.
Sec. 641, T. 18, U.S.C.

That on or about September 10, 1950, at the Victory Village Housing Project, Henderson, Clark County, State and District of Nevada, George William Pickard, defendant named above, he then and there being a custodial employee of the Federal Public Housing Authority, at said Victory Village Housing Project, did embezzle certain property of the United States, to wit, eight (8) sheets of the value of $2.50 each.

Count II.
(Sec. 641, T. 18, U.S.C.)

That on or about October 1, 1950, at the Victory Village Housing Project, Henderson, Clark County, State and District of Nevada, George William Pickard, defendant named above, he then and there

being a custodial employee of the Federal Public Housing Authority, at said Victory Village Housing Project, did embezzle certain property of the United States, to wit, a bundle of sheets and blankets, valued at approximately $50.00.

Count III.
(Sec. 641, T. 18, U.S.C.)

That on or about November 15, 1950, at the Victory Village Housing Project, Henderson, Clark County, State and District of Nevada, George William Pickard, defendant named above, he then and there being custodial employee of the Federal Public Housing Authority, at said Victory Village Housing Project, did embezzle certain property of the United States, to wit, twelve (12) sheets, of the value of $2.50 each.

Count IV.
(Sec. 641, T. 18, U.S.C.)

That on or about December 15, 1950, at the Victory Village Housing Project, Henderson, Clark County, State and District of Nevada, George William Pickard, defendant named above, he then and there being a custodial employee of the Federal Public Housing Authority, at said Victory Village Housing Project, did embezzle certain property of the United States, to wit, seven (7) woolen blankets, of the value of $2.50 each.

Count V.
(Sec. 641, T. 18, U.S.C.)

That on or about September 10, 1950, at the Victory Village Housing Project, Henderson, Clark County, State and District of Nevada, William Hershel Cagle, defendant named above, did receive, conceal and retain, with intent to convert to his own use or gain, certain property of the United States, to wit, eight (8) sheets, of the value of $2.50 each, knowing the same to have been embezzled.

Count VI.
(Sec. 641, T. 18, U.S.C.)

That on or about October 1, 1950, at the Victory Village Housing Project, Henderson, Clark County, State and District of Nevada, William Hershel Cagle, defendant named above, did receive, conceal and retain, with intent to convert to his own use or gain, certain property of the United States, to wit, a bundle of sheets and blankets, valued at approximately $50.00, knowing the same to have been embezzled.

Count VII.
(Sec. 641, T. 18, U.S.C.)

That on or about November 15, 1950, at the Victory Village Housing Project, Henderson, Clark County, State and District of Nevada, William Hershel Cagle, defendant named above, did receive, conceal and retain, with intent to convert to his own use or gain, certain property of the United States, to wit, twelve (12) sheets, of the value of $2.50 each, knowing the same to have been embezzled.

Count VIII.
(Sec. 641, T. 18, U.S.C.)

That on or about December 15, 1950, at the Victory Village Housing Project, Henderson, Clark County, State and District of Nevada, William Hershel Cagle, defendant named above, did receive, conceal and retain, with intent to convert to his own use or gain, certain property of the United States, to wit, seven (7) woolen blankets, of the value of $2.50 each, knowing the same to have been embezzled.

MILES N. PIKE,
United States Attorney.

By /s/ WM. J. KANE,
Assistant U. S. Attorney.

[Endorsed]: Filed May 29, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS AND QUASH INFORMATION AND EXONERATE BOND

The defendants, George William Pickard and William Hershel Cagle move the Court to dismiss and quash that certain information filed herein on May 29, 1952, and to exonerate the bail of said defendants, upon the following grounds and for the following reasons:

That an indictment was filed herein on Septem-

ber 25, 1951, and pursuant to motion to dismiss said indictment same was dismissed by this Court on April 30, 1952.

That in the order dismissing same the following order was made:

"It is further ordered that the defendants, George William Pickard and William Hershel Cagle, and each of them, be held in custody or their bail be continued until May 30, 1952, pending the filing of a new indictment on information."

That an indictment cannot be amended by the filing of an information.

JOHN W. BONNER,
D. FRANCIS HORSEY.

By /s/ JOHN W. BONNER,
Attorneys for Defendants.

Notice of Motion

To: United States of America, Plaintiff above named, and

To: Miles N. Pike, United States Attorney.

You and Each of You will please take notice that the defendants, George William Pickard and William Hershel Cagle, will on Monday the 22nd day of September, 1952, at the hour of 10:00 a.m., or as soon thereafter as counsel can be heard, move the Court to dismiss and quash information and exonerate bond in the above-entitled action on the

grounds and for the reasons shown in the foregoing motion.

Dated this 9th day of September, 1952.

JOHN W. BONNER,
D. FRANCIS HORSEY.

By /s/ JOHN W. BONNER,
Attorneys for Defendants.

Affidavit of mailing attached.

[Endorsed]: Filed September 10, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS INFORMATION

The defendant, William Hershel Cagle moves the Court to dismiss that certain information filed herein on May 25, 1952, on the following grounds and for the following reasons:

That said information is in effect an attempt to amend an indictment by information contrary to law and that pursuant to Rule 5C of the Federal Rules of Criminal Procedure said defendant was entitled to a preliminary examination prior to his arraignment which was denied him by virtue of said unlawful procedure taken as hereinabove referred to.

/s/ JOHN W. BONNER,
Attorney for Defendant William Hershel Cagle.

NOTICE OF MOTION

To: United States of America, Plaintiff above named, and Miles N. Pike, United States Attorney:

You and Each of You will please take notice that the defendant, William Hershel Cagle, will on Wednesday, the 10th day of December, 1952, appear at the hour of 11:00 a.m. or as soon thereafter as counsel can be heard, move the Court to dismiss the information in the above-entitled action on the grounds and for the reasons shown in the foregoing motion.

Dated this 9th day of December, 1952.

/s/ JOHN W. BONNER,
Attorney for Defendant,
William Hershel Cagle.

319 Fremont Street, Las Vegas, Nevada.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 9, 1952.

United States District Court for the
District of Nevada

No. 12,332

THE UNITED STATES

vs.

GEORGE WILLIAM PICKARD and WILLIAM HERSHEL CAGLE

ORDER MOTION TO DISMISS AND QUASH INFORMATION AND EXONERATE BOND AND MOTION TO DISMISS INFORMATION BE GRANTED

(Copy of Minute Order of Dec. 11, 1952.)

This being the time heretofore fixed for hearing on Motion to Dismiss and Quash Information and Exonerate Bond, Motion for Severance, and Motion to Dismiss Information, and the same coming on regularly this day. The defendants are present and with their attorneys, John W. Bonner, Esq., and D. Francis Horsey, Esq. William P. Compton, Esq., Assistant U. S. Attorney, appears for and on behalf of the plaintiff. The Motions to Dismiss are taken up first. Following arguments by counsel, namely, Messrs. Bonner and Compton, counsel stipulate that no complaint set forth in the present information was ever filed with a U. S. Commissioner. It Is Ordered that the Motion to Dismiss and Quash Information and Exonerate Bond and the Motion to Dismiss Information be, and they hereby are,

granted, the defendants' bonds exonerated and said defendants released from custody.

A true copy from the records.

Attest:

[Seal] /s/ AMOS P. DICKEY,
Clerk.
By /s/ C. R. DAVENPORT,
Deputy.

In the United States District Court
for the District of Nevada

No. 12,332

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE WILLIAM PICKARD and WILLIAM HERSHEL CAGLE,
Defendants.

TRANSCRIPT OF HEARING ON MOTION TO DISMISS

Before: Hon. Roger T. Foley, Judge.

Be It Remembered, That the above-entitled matter came on regularly for hearing before the Court at Las Vegas, Nevada, on Thursday, the 11th of December, 1952, the plaintiff being represented by Mr. William P. Compton, and the defendants being present in court, defendant Pickard being represented by Mr. Charles Lee Horsey, Jr., and the

defendant Cagle being represented by Mr. John Bonner. The following proceedings were had:

The Court: I would be glad to hear from you, Mr. Bonner.

Mr. Bonner: There is a little confusion in my mind as to the disposition of a motion that was filed in case No. 12,261, which was indictment against the same defendants. We made a motion to quash the information and exonerate the bond on the [1*] ground that this Court had made an order sustaining the motion to dismiss on the grounds the complaint did not constitute a public offense and allowed the government until May 30, 1952, to file a new indictment, an information. Now they filed an information on the 29th day of May, 1952, and gave it a new number, No. 12,332, which charged misdemeanors, so it wasn't an amendment apparently, but a new information entirely, a new case number, and changing the charges from a felony to a misdemeanor.

Now in the letter I received from Mr. Compton, dated October 7, 1952, he stated as follows:

> "Your motion in the above matter was on yesterday's calendar and the Court was informed that we have no objection to the return of the bond. However, it was decided by the Court to leave the bond in effect and the motion has been set for hearing December 11, 1952 * * *," etc.

Now I did not know whether your Honor had overruled our motion, with the exception of exoneration

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

of the bond, or whether you had continued the matter to be argued at this time, that is, the entire motion.

The Court: You mean your motion directed to this new case?

Mr. Bonner: Yes.

The Court: No, there is no ruling on it at all.

Mr. Bonner: Then, your Honor, I would like to argue the first motion at this time, motion to dismiss this information, on the grounds that you cannot amend an indictment by an information, and the authorities are attached to the Notice of the Motion.

Now it is elementary—I think your Honor will agree with me that this is an elementary principle of law—that an indictment may not be amended by an information. It would have to be resubmitted to a grand jury. So that is what they have attempted to do here, to amend this indictment by filing an information for a misdemeanor, which they cannot do, your Honor, because if they want to drop their felony case altogether and start a new case, they have to proceed by complaint and we are entitled to a preliminary hearing. Under Rule 3 of the Federal Rules of Criminal Procedure, it says:

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

"Rule 4. Warrant or Summons Upon Complaint.

"(a) Issuance. If it appears from the complaint

that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it * * *."

Then it talks about the form of warrant.

"Rule 5: An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Now they have not got any of that, your Honor, and they are trying to obviate the necessity of all those proceedings by what they probably call an amendment of the indictment, which they cannot do.

The Court: Let me ask the United States attorney a question. It is not your custom, it has not been the practice at any time in the United States attorney's office to file information of misdemeanors without commissioner's complaint?

Mr. Compton: The usual procedure is to file it directly with the Court.

The Court: A misdemeanor, without opportunity for preliminary hearing?

Mr. Compton: An information can be filed, your Honor, without permission of the Court at any time under Rule 7 and the usual course in our office is

to file an information without a commissioner's complaint. The last line, "An information may be filed without leave of court."

The Court: Well, these two rules should be read together, it seems to me. I can't see anything in Rule 7 that excludes the necessity of filing a complaint with a magistrate.

Mr. Compton: Well, your Honor, you wouldn't file an information with the commissioner, of course.

The Court: I know that, but before you file either an information or an indictment, it seems to me that the complaint should be filed with the commissioner or some other magistrate, with opportunity for the defendant to have a hearing.

Mr. Compton: Well, we have never followed that practice, your Honor.

The Court: Where would you get your warrant?

Mr. Compton: File an information and the warrant is issued by the district clerk.

The Court: You take this to apply in any case, felony or misdemeanor, that an information can be filed without leave of Court?

Mr. Compton: No, your Honor. In felony cases it specifically provides that unless there is a waiver by the defendant in open court, an information can not be filed by the United States attorney, but in respect to misdemeanors that isn't true.

The Court: How do you avoid Rule 3?

Mr. Compton: Your Honor, we may have been wrong, but I never considered that that was in a case such as this mandatory.

The Court: Why not? Where do you find anything to avoid it?

Mr. Compton: There is nothing specifically there, of course. Your Honor, let us look at it this way——

The Court: Let me look at this here. A misdemeanor under federal statutes may be punished by substantial penalties.

Mr. Compton: That is correct, your Honor.

The Court: Not more than a year, but as much as one year or as much as a thousand dollar fine, or both. Now a man who is put on trial for a misdemeanor without having an opportunity to have a hearing to determine whether or not there is probable cause, it would seem to me that one of the purposes [6] for giving a preliminary hearing is to prevent, so far as may be possible to do so, a person to be wrongfully placed upon trial, and if the government can not file before a magistrate, he certainly would be permitted to hail an individual before a court and jury.

Mr. Compton: Well, you know, your Honor, among these cases——

The Court (Interceding): Draw my attention to any rule that would excuse the government in misdemeanor cases from proceeding by compliance with Rules 3, 4, and 5. There is no exception stated to the rule, so far as misdemeanors are concerned and I do not think there should be, Mr. Compton. This is the first time it ever came to my notice that people were charged with misdemeanors in this court without having opportunity for a hearing before a magistrate.

Mr. Compton: Is there any difference——

The Court (Interceding): Yes, what is the purpose of having a hearing before a magistrate?

Mr. Compton: What I started to say, your Honor, is this, in many many of these cases there is no commissioner's complaint filed. The case is presented to a grand jury.

The Court: An indictment is a different [7] thing.

Mr. Compton: I realize the element of probable cause is considered in the grand jury.

The Court: Can you cite me any authority that in any case Rule 3 should not be complied with?

Mr. Compton: There is a statement, your Honor, in——

The Court (Interceding): In the first place, so the record may be clear, you will stipulate, will you not, on the part of the government, that there was no complaint charging the offense set forth in this present information, filed with the commissioner or other officer?

Mr. Compton: You mean on this information?

The Court: Yes.

Mr. Compton: I couldn't do otherwise, your Honor. Let me read a paragraph from Barron & Holzoff Federal Practice and Procedure, Vol. 4, and it appears at page 55 under "Classification of Offenses." It says:

"Therefore, all petty offenses and all misdemeanors may be prosecuted either by indictment or by information. No indictment is necessary under the constitution, rule or statute. An infor-

mation for a misdemeanor may be filed without regard to the pendency or result of proceedings before a magistrate or United States [8] Commissioner to bind a defendant over to the grand jury.

"Leave to file an information is unnecessary in view of subdivision (a) of this rule. Prior to this rule, however, leave to file an information was a condition precedent and its granting was discretionary with the trial court."

The Court: Have you authority on that first statement?

Mr. Compton: Your Honor. Judge Holtzoff cites Yaffee v. United States, 276 Federal 497. He also cites United States v. Achen, 267 Fed. 595.

Mr. Bonner: We will agree that if complaint is filed and the grand jury meets and returns an indictment, no proceedings are required before a commissioner, where it has gone to the grand jury, but we take this position, and I am sure we are right, we are entitled to either a grand jury indictment or a preliminary hearing, one or the other, and that is our position, so that the law he has urged is correct, of course, because if a complaint is filed and grand jury returns an indictment, there is no need of the commissioner determining whether or not there is probable cause, because that is what the grand jury does. But in this case the government is attempting to circumvent both the grand jury and magistrate, which can not be done. They do not intend to go to the grand jury in this case. They [9] want to set it down for trial now without submitting it either to the commissioner or the

grand jury, which they may not do. That is our contention. In other words, we are entitled to a hearing some place to see if there is probable cause before we are required to plead.

The Court: This, of course, wouldn't be any guide, but consider our State court practice. Generally, I suppose, those statutory mandates are all made with an eye to comply with the federal statutes provisions. No one could be tried in the District Court of Nevada in a reasonable jurisdiction unless he has or has had an opportunity to have had a preliminary examination. Now you can't think of any case where that would happen.

Mr. Compton: Your Honor, I know personally in cases in the District Court over here, whether they violated——

The Court: What kind of cases?

Mr. Compton: They are criminal cases.

The Court: I know differently, so there is no use arguing that. I know differently. It was with authority of law.

Mr. Compton: What I call to your attention—I recall a case when Mr. Jones was district attorney and the Justice of the Peace dismissed the matter for lack of probable cause and then the district attorney turns around and files an information [10] and gets them directly into court.

The Court: He must have had permission of the district judge to file the information.

Mr. Bonner: There must have been a preliminary hearing and denial by the magistrate. He must

first have had a preliminary hearing and the justice of the peace must have refused to retain him and then he obtained leave of the district judge and filed an information.

The Court: Take the reading of this section, Rule 5, subdivision (c), now look at that:

"The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. * * *"

Now that is that Rule 5 and under Rule 5 any one who is arrested has certain rights:

"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer [11] empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Now there is another interesting thing that I notice. If you will read the recent Supreme Court decisions of the United States, I don't suppose there is anything new about these cases, but you see that the Court is inclined to look with disfavor upon proceedings in course of the prosecution such as a confession—say a confession is obtained without any coercion or improper conduct on the part

of any officer, but it would appear to the Court that the defendant has not been brought in before a magistrate for as short a period as 24 hours, they are critical and perhaps justly so. There is no reason in the world why a man who is arrested, charged with an offense, should not be brought before a magistrate who can give him a hearing and arraign him and give him opportunity for cousel. He is not to be picked up on misdemeanor charges and put in jail for an indefinite time to suit the convenience of some prosecuting [12] officer. This Rule 5, subdivision (a):

"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. * * *"

Now these defendants are entitled to be brought before the magistrate immediately without unnecessary delay. Now Rule (b):

"The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him."

You know those are very solumn rules. They are rules that go right to the bulwarks of our freedom.

If a man can be picked up on any charge, misdemeanor or felony, and cast into jail and lay there for a week without an opportunity to have counsel, you can see why there are so many reasons [13] for confessions across the Iron Curtain. Some of those men have been in custody as long as two years and this is the thing that prevents that kind of conduct on the part of government agents or misguided or perhaps malicious officials, prosecuting attorneys. Of course, we haven't anything like that in this State. No inference of that, but I am talking about why we have these rules. Now I don't see where there is any distinction here or any waiver of right to have a complaint and be speedily brought before a United States marshal or some magistrate. I can't see——

Mr. Compton: I am frank to say I am in the position of shirking responsibility of this matter; also I am frank to say I wouldn't have done it the way it was done. This information was filed up North.

The Court: I am going to look at these cases. It seems to me in any case where there is misdemeanor or felony these Rules 3, 4, and 5 should be regarded. I do not know of any exception. Where is your case you cited to me a little while ago?

Mr. Compton: U. S. vs. Yaffee, 276 Federal, 497.

The Court: I don't want to be rash about this or make any improper order, but have you any contention to make against this idea? Do you see anything in the [14] law or any case that does

away with the necessity of a complaint before a magistrate?

Mr. Compton: No, I don't your Honor. As your Honor said, these rules must be read together. In all fairness I can't see how the government can escape the necessity of filing a commissioner's complaint. I know it has been done in other cases.

The Court: What is the citation Holtzoff makes in the Yaffee case?

Mr. Compton: In the text he says, speaking of petty offenses and misdemeanors, he says:

"No indictment is necessary under the constitution, rule or statute. An information for a misdemeanor may be filed without regard to the pendency or result of proceedings before a magistrate or United States Commissioner to bind a defendant over to the grand jury."

The Court: Mr. Bonner, have you found any cases cited in this edition under federal rules?

Mr. Bonner: No, I have not, but I would like to point out both of these cases refer to a matter of proceeding before a commissioner and thereafter the grand jury meets and returns indictment, therefore the commissioner's proceeding vacated, which we deem is not in point at all in the case before the [15] Court. We don't have that situation at all.

Mr. Compton: We do have a similar situation. We have an indictment.

Mr. Bonner: Well, you have dropped your indictment, so you are starting out all over again with a misdemeanor.

The Court: Under the Fifth Amendment of the federal constitution it says: (Reads.)

Mr. Compton: That its the situation we have here. Your Honor sustained motion to dismiss the indictment for insufficiency and then an information is filed. That is exactly the situation we have here.

The Court: That would amount to amending an indictment by an information. You have followed the Court's ruling by filing an information, but you have done more than that, you have reduced the degree of the offense here, but taking your last statement, that would amount to saying that you have amended the indictment by an information, on the basis of your last statement. I don't see how you can avoid the effect of Rules 3, 4, and 5. Is there anything in the rules anywhere which exempts misdemeanors from their operation?

Mr. Bonner: I have never found any, your Honor. I do not think there is any way they can get around it.

Mr. Compton: I do not know anything exempting it, your [16] Honor, but on the other hand I do not find anything——

The Court (Interceding): I am going to grant the motion on the ground that neither one of the defendants was first brought before the magistrate in compliance with the rules. I am doing that because I have not been advised that misdemeanors have been exempted from the operation of these statutes and I do not think the district attorney has any cases to show. In other words, it is ad-

mitted by the government here that no complaint was made before a commissioner or other officer empowered to commit persons charged with offenses against the United States, as authorized or required by Rule 3. No warrant has been issued after the appearance of probable cause, nothing has occurred that would indicate that there is probable cause; in other words, there was no hearing. Rules 3, 4, and 5 have not been complied with, so the case is dismissed, defendants are released from custody and bail is exonerated. [17]

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had at the hearing on Motion to Dismiss in the case entitled, United States of America, Plaintiff, vs. George William Pickard and William Hershel Cagle, Defendants, No. 12,-332, held in Las Vegas, Nevada, on December 11, 1952, and that the preceding pages, numbered 1 to 17 inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Las Vegas, Nevada, January 31, 1953.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed February 2, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: United States of America.

Name and address of Appellant's attorney: Miles N. Pike, Esquire, Federal Building, Reno, Nevada.

Offense: Embezzlement of property of the United States; having knowingly received embezzled property of the United States. Alleged violation. Section 641, Title 18, U.S.C.

Concise statement of judgment or order, giving date, and any sentence: Order of United States District Court entered December 11, 1952, granting defendant's motion to dismiss the information as to each of the two defendants.

The above-named appellant, United States of America, upon authorization so to do by the Solicitor General of the United States, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-entitled order.

Dated: January 7, 1953.

/s/ MILES N. PIKE,
United States Attorney,
Attorney for Appellant.

[Endorsed]: Filed January 8, 1953.

[Title of District Court and Cause.]

STATEMENT OF DOCKET ENTRIES

1. Information for Violation of Sec. 641, T. 18, U.S.C. filed May 29, 1952.

2. Arraignment: Not arraigned.
Motions to dismiss filed 9/10/52 and 12/9/52.

3. Plea to indictment or information: No pleas entered.
Motions to dismiss heard and granted Dec. 11, 1952.

4. Motion to withdraw plea of guilty denied.

5. Trial by jury, or by court if jury waived.

6. Verdict or finding of guilt: Motions to dismiss granted Dec. 11, 1952.

7. Judgment—(with terms of sentence) or order: Ordered that defts'. motions to dismiss granted, bonds exonerated and defts. released from custody. Entered: December 12, 1952.

8. Notice of appeal filed: January 8, 1953.

Dated: January 8, 1953.

AMOS P. DICKEY,
Clerk.

Attest:
By /s/ O. F. BRATT.
Deputy Clerk.

[Title of District Court and Cause.]

United States of America,
District of Nevada—ss.

CERTIFICATE OF CLERK

I, Amos P. Dickey, Clerk of the United States District Court for the District of Nevada, do hereby certify that the attached and accompanying documents are the originals filed in this Court, or true and correct copies thereof, as called for by the Designation of Contents of Record on Appeal filed herein by the appellant, and that they constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 3rd day of February, 1953.

AMOS P. DICKEY,
Clerk,

[Seal] By /s/ C. R. DAVENPORT,
Deputy Clerk.

[Endorsed]: No. 13701. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. George William Pickard and William Hershel Cagle, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed February 4, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13701

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE WILLIAM PICKARD and WILLIAM HERSHEL CAGLE,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The points on which appellant intends to rely on appeal are as follows:

1. The District Court erred in a ruling of law when it dismissed the Information.

2. The District Court erred in concluding the defendants were entitled to a preliminary hearing under Rule 5, Federal Rules of Criminal Procedure, or any other rule, prior to the filing of the Information.

Dated: Reno, Nevada, February 12, 1953.

JAMES W. JOHNSON, JR.,
United States Attorney,

By /s/ ROBERT L. McDONALD,
Assistant U. S. Attorney.

[Endorsed]: Filed February 13, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 19(6), Rules of Practice of United States Court of Appeals for the Ninth Circuit, the appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by Notice of Appeal filed January 9, 1953, the following portions of the record, proceedings, and evidence in the above case:

1. The Information, filed herein May 29, 1952.

2. The Motion to Dismiss and Quash Information and Exonerate Bond on behalf of both defend-

ants, George William Pickard and William Hershel Cagle, filed herein September 10, 1952.

3. The Motion to Dismiss Information on behalf of defendant, William Hershel Cagle, filed herein December 9, 1952.

4. The Order of the Court granting said Motions to Dismiss the Information, entered December 11, 1952.

5. Transcript of all testimony, affidavits, proceedings, motions, arguments, and rulings of the Court given, made and had at the hearing of defendants' motions on December 11, 1952.

6. Notice of Appeal.

7. This Designation of Contents of Record on Appeal.

8. Transcript of Minutes of the Clerk entered at the hearing on December 11, 1952.

9. Transcript of docket entries by the Clerk of the Court pertaining to said motions and the order granting the same, and appellate proceedings had herein.

JAMES W. JOHNSON, JR.,
United States Attorney,

By /s/ ROBERT L. McDONALD,
Assistant U. S. Attorney.

[Endorsed]: Filed February 13, 1953.

No. 13,701

IN THE

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGE WILLIAM PICKARD AND
WILLIAM HERSHEL CAGLE,
Appellees.

BRIEF OF APPELLEES

JOHN W. BONNER,
319 Fremont Street,
Las Vegas, Nevada.

Attorney for Appellee,
William Hershel Cagle.

D. FRANCIS HORSEY
425 Fremont Street,
Las Vegas, Nevada.

Attorney for Appellee,
George William Pickard

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

TEXT BOOKS

CONSTITUTIONAL PROVISIONS

IN THE

United States Court of Appeals For the Ninth Circuit

No. 13,701

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGE WILLIAM PICKARD AND WILLIAM HERSHEL CAGLE,
Appellees.

BRIEF OF APPELLEES

QUESTIONS INVOLVED

We believe that in addition to the questions presented in appellant's opening brief the following questions are also in issue herein, namely:

Was the lack of any affidavit or verification of either the information filed or by criminal complaint under oath in view of appellees' motion to dismiss of sufficient grounds to warrant the Court's dismissal of the action?

Did the Court err in granting appellees' motion to dismiss?

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, **but upon probable cause, supported by Oath or affirmation,** and particularly describing the place to be searched, and the persons or things to be seized.

ARGUMENT

A person cannot be prosecuted by information in Federal Courts unless the information is verified or unless a verified complaint is filed as basis for such prosecution.

U. S. vs. Smith (C. C.) 40 Fed. 755 (1899)
U. S. vs. Tureaud (C. C.) 20 Fed. 621 (1884)
State vs. Polite, 35 Fed. 58 (1888)
Johnson vs. U. S. 87 Fed. 187, 30 C. C. A. 612 (1898)
U. S. vs. Baumert (D. C.) 179 Fed. 735 (1910)
U. S. vs. Morgan 222 U. S. 274, 282, 32 Sup. Ct. 81, 82 (56 L. Ed. 198 (1911)
Fosters Federal Practice (5th Ed.) Sec. 494, Page 1659

Most States follow such rule:
Lustig vs. People, 18 Colo. 217, 32 Pac. 275
State vs. Gleason, 32 Kan. 245, 4 Pac. 363
Myers vs. People, 67 Ill. 503
Eichenlaub vs. State, 36 Ohio St. 140
DeGraffe vs. State, 2 Okla. Cr. 519, 103 Pac. 538
Thornberry vs. State, 3 Tex. App. 36

State vs. Bailter, 5 Wyo. 236, 39 Pac. 883
11328 Nevada Compiled Laws 1929

We believe the case of Weeks v U. S. 216 Fed. Rep. 292, cited by appellant at page 4, opening brief is distinguishable from the instant case in that a plea was entered by the defendant, the case tried and a conviction obtained, whereas in the instant case the action was dismissed upon motion of appellees and no plea entered nor did appellees submit themselves to the Court's jurisdiction.

The cases of Creekmore v U. S. 237 F. 743, 150 CCA 497, L.R.A. 1917C 845 and Kelly v U. S. 250 Fed. Rep. 947 cited on page 49 appellant's brief may be distinguished from instant case in that affidavits accompanied the information in both cases; in the instant case no affidavit of any kind was filed either by way of complaint or in support of the information. The cases are therefore not controlling in the instant case.

The case of Yaffee v U. S. 276 F. 497, cited in page 5 appellant's brief is likewise not in point as an affidavit was filed with the information therein.

The lower Court correctly held in the instant case that appellees were entitled to be proceeded against in accordance with rules 3, 4 and 5 of the Federal Rules of Criminal Procedure and the filing of the information without such preliminary procedure, in view of the motion to dismiss because of such failure, that appellees were entitled to have the information quashed and the action dismissed.

Pertinent parts of rules 3, 4 and 5 provide as follows:

Rule 3. The complaint. — The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or summons upon complaint. — (a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

Rule 5. Proceedings before the commissioner. — (a) Appearance before the commissioner.—An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the commissioner. — The commissioner shall inform the defendant of the com-

plaint against him, of his rights to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) Preliminary examination. — The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that and offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

In the case of U. S. v Wuersele 13 Fed. (2nd) 952, the Court at page 953 said:

"Defendant should have been taken before the commissioner. Chapter 301, sec. 1, of the Act of August 18, 1894 Comp. St. 1678. He should have been taken before the commissioner at Dunkirk, and he was entitled to a hearing before such commissioner; and, moreover, defendant had the right to examine the person upon whose affidavit the search warrant was issued."

In the case of U. S. v Reilley, 20 Fed. 46, Circuit Court, d. NEVADA, the Court at page 46 said:

"Generally, in this circuit, unless for some substantial reason the court otherwise determines, it has been required that the party charged shall be examined and held to answer by some committing Magistrate, or else that evidence showing probable cause should be made to appear in some proper form before granting leave. In this case the information was verified by the direct, positive affidavit of the United States Attorney, and, upon being arrested upon a warrant issued thereon, the prisoner was examined and held to answer for the offense set out in the information."

Pertinent parts of Rule 7, Federal Rules of Criminal Procedure provides as follows:

Rule 7. The indictment and the information. — (a) Use of indictment or information. — An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by miprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted

by indictment or by information. An information may be filed without leave of court.

Rule 7 did not change the rules requiring verification of some kind as basis for filing information and the courts retain the same rights they had prior to such amendment to require proper safeguards as basis for filing information with the exception that the information may now be dismissed rather than refusal to grant leave to file information which was practice before new rules in accordance with foregoing authorities.

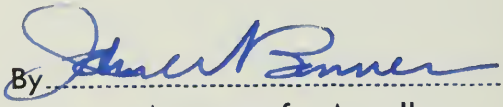
CONCLUSION

We respectfully contend that rules 3, 4 and 5 provide a procedure available to any accused person where no indictment has been returned; otherwise the elementary principle as set forth in the Fourth Amendment to United States Constitution requiring a showing of probable cause as a prerequisite to any prosecution would be ignored and given no legal effect; we further contend the law of the State of Nevada and most all States prohibit the institution of a criminal proceeding for any type of offense under circumstances similar to those of this case; said rules 3, 4 and 5 offer fundamental safeguards to individual liberty to which any accused person is entitled, especially when proper and timely objection is made

and such rights are not waived which is the situation in this case. The lower Court properly dismissed the action. (Emphasis added where in bold type.)

Respectfully submitted,

JOHN W. BONNER
D. FRANCIS HORSEY

By 

Attorneys for Appellees,

319 Fremont Street,
Las Vegas, Nevada.

No. 13,701

In The

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGE WILLIAM PICKARD and
WILLIAM HERSHEL CAGLE,
Appellees.

REPLY BRIEF OF APPELLANT

JAMES W. JOHNSON, JR.,
United States Attorney for
the District of Nevada,
Room 303, Federal Building,
Reno, Nevada,
Attorney for Appellant.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases and Texts

RULES

In The

United States Court of Appeals For the Ninth Circuit

No. 13,701

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGE WILLIAM PICKARD and
WILLIAM HERSHEL CAGLE,
Appellees.

REPLY BRIEF OF APPELLANT

QUESTIONS INVOLVED

Appellees raise in their answering brief the question of whether or not an affidavit of verification of an information filed by the United States Attorney of necessity must contain an oath. They further cite the Fourth Amendment to the United States Constitution.

ARGUMENT

As was previously pointed out in appellant's opening brief, an information need not be supported by an oath or affidavit unless it is the desire that a warrant of arrest issue upon such information in a misdemeanor charge. In

U. S. v. Grady, 185 F. 2d 273, the Court very succintly set out the rule to be followed in a case where an information is filed in a misdemeanor charge. The Court in that case stated, at page 275, as follows:

> "Whatever might have been the rule prior to the adoption of the Federal Rules of Criminal Procedure, 18 U. S. C. A., it seems plain by Rule 7(a) that an information need not be verified by affidavit, and it 'may be filed without leave of court.' And by Rule 9(a), it seems equally plain that an information need be supported by an oath only when there is a request by the government attorney for the issuance of a warrant, and in the absence of such oath only a summons will issue requiring the defendant to appear. Therefore, there is no basis for the argument that the affidavit in the instant case was either a part of the information or a requisite to its validity. Its sole purpose was to enable the government to obtain the issuance of a warrant."

In the instant case no warrant of arrest was requested, nor was any warrant of arrest ever issued, but the defendants voluntarily appeared in Court as a result of a Court order contained in the original dismissal of an indictment (R. 7). Consequently, the citations of appellees in this case are not in point, but go to those cases wherein an information was filed by the United States Attorney with an oath or affirmation or affidavit attached for the purpose of having the Court issue a warrant of arrest.

Further, the Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,* and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis ours.)

The wording of this section of the Constitution very definitely carries out the theory of the appellant in this case, that is, that no warrant shall issue but upon probable cause by oath or affirmation. The facts in the present case do not fall within the exclusion due to the fact that as a matter of record and as a matter of fact no warrant in this case was issued or requested at any time during the proceedings. Had the United States Attorney desired a warrant of arrest to issue upon the information he may have at any time filed an affidavit for the issuance of a warrant of arrest.

Appellees cite Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure as being controlling in this matter. It is the feeling of the appellant that these rules are not an issue in this case, but that the issues involved arise under Rule 7 and Rule 9(a), which provide for a procedure of bringing a defendant before the bar, which is additional procedure to that set out in Rules 3, 4 and 5.

CONCLUSION

While it is true that Rules 3, 4 and 5 provide a procedure available to any accused person where no indictment is returned, so does Rule 7 provide a procedure for the filing of an information in a misdemeanor action where no indictment has been returned.

We, therefore, respectfully contend that under the laws set out in appellant's opening brief the Court erred in the instant case in dismissing the information, upon the grounds hereinbefore set out.

DATED: June 24, 1953.

Respectfully submitted,

JAMES W. JOHNSON, JR.,
United States Attorney for
the District of Nevada,
Attorney for Appellant.

No. 13,703

IN THE

United States Court of Appeals

For the Ninth Circuit

ERNEST B. LOPEZ,

Appellant,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

CHAUNCEY TRAMUTOLO,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
422 Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 13,703

IN THE

United States Court of Appeals

For the Ninth Circuit

ERNEST B. LOPEZ,

Appellant,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for writ of habeas Corpus. (Tr. 6.) The appellant asserts that the Court below had jurisdiction to entertain the petition under the provisions of Title 28 U.S.C.A., Sections 2241-2250 and 2255. Jurisdiction to review the order of the Court below denying the application is conferred upon this Honorable Court by Title 28 U.S.C.A., Section 2253.

FACTS OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, sought by petition for writ of habeas corpus to secure his release from the custody of the appellee, the warden of the said institution. (Tr. 1-5.) In his petition, appellant alleged that with good time credits earned he had served more than thirteen years of sentences totalling seventeen years, seven years first imposed against him by the United States District Court for the Southern District of California on July 30, 1943—five years for receiving stolen government property, and two years for conspiracy—and thereafter ten years imposed against him by the United States District Court for the Western District of Washington for violations of the Federal Escape Act.[1] Petitioner further alleged that these thirteen years were all that he could be legally compelled to serve since the trial Court for the Southern District of California could only impose a valid sentence of one year for the theft violation. Thereupon, after consideration of the cause, the Court below denied the application on the ground that it was without jurisdiction to entertain the same. (Tr. 6.) Thereafter, the appellant filed a motion for a new trial (Tr. 7-9) which the Court below likewise denied on the same ground on which it had denied the petition, and on the additional ground that the said petition failed to state a claim upon which relief could be granted. (Tr. 10.) From

[1]Appellant did not state in his petition the date sentence was imposed against him in the Western District of Washington.

the order denying the petition for writ of habeas corpus, the appellant now appeals to this Honorable Court. (Tr. 11.)

QUESTION.

Did the appellant state a cause of action cognizable in habeas corpus?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

In its original order denying appellant's application for writ of habeas corpus, the Court found that it was without jurisdiction to entertain the same since appellant's remedy, if any, was not by habeas corpus but by motion to vacate sentence under the provisions of Title 28 U.S.C.A., Section 2255, citing the decision of this Honorable Court in *Sorrentino v. Swope,* 198 Fed. (2d) 789. Cf. *Lopez v. United States,* (C.A. 9) 186 Fed. (2d) 707. Assuming arguendo that the Court below had jurisdiction to entertain the petition, it could properly have been denied as it was by the Court below in its order denying appellant's motion for a new trial herein on the ground that the said petition failed to state a claim upon which relief could be granted. The basis of appellant's complaint

is that he was improperly tried and sentenced in the United States District Court for the Southern District of California for receiving stolen government property under Title 18 U.S.C.A., formerly Section 101, which provided for a maximum sentence of five years, when, in fact, he should have been tried and sentenced under certain Sections of the Second War Powers Act of 1942, which carried a maximum sentence of one year. It should be noted in this connection that the stolen government property consisted of certain gasoline ration books prepared and printed for issuance by the Office of Price Administration, an agency of the United States of America. This contention of appellant is so patently without merit that appellee believes that it can be disposed of in the language of the Court below when it said, among other things, that appellant's petition fails to state a claim upon which relief can be granted.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
April 17, 1953.

CHAUNCEY TRAMUTOLO,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

No. 13713

United States
Court of Appeals
for the Ninth Circuit.

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-19-53

No. 13713

United States
Court of Appeals
for the Ninth Circuit.

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-19-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF COUNSEL

ROBERT A. YOTHERS, of
POMEROY, YOTHERS, LUCKERATH & DORE,
304 Spring Street,
Seattle 4, Washington,

Attorneys for Appellants.

J. CHARLES DENNIS,
1017 U. S. Court House,
Seattle 4, Washington,

Attorney for Appellee.

United States District Court, Western District of Washington, Northern Division

No. 48,518

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO, an Individual,

Defendants.

INDICTMENT

The Grand Jury charges:

Count I.

That the Golden Grain Macaroni Company, Inc., a corporation organized and existing under the laws of the State of California and trading and doing business at Seattle, State of Washington, and Paskey Dedomenico, an individual, at the time hereinafter mentioned president of said corporation, did, within the Northern Division of the Western District of Washington, on or about June 25, 1951, in violation of the Federal Food, Drug and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Seattle, State of Washington, for delivery to Lewiston, State of Idaho, consigned to

McPherson's Surefine, a number of packages containing a food;

That displayed upon said packages, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was, among other things, the following printed and graphic matter:

Golden Grain
Enriched
Egg Noodles
1 Lb. Net
Golden Grain Macaroni Co.
San Francisco—Seattle

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was then and there adulterated within the meaning of 21 U.S.C. 342 (a) (3) in that it consisted in part of a filthy substance by reason of the presence in said food of insect larvae and insect fragments.

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was further adulterated within the meaning of 21 U.S.C. 342 (a) (4) in that it had been prepared, packed and held under insanitary conditions whereby it may have become contaminated with filth;

That on March 14, 1947, the said Golden Grain Macaroni Company, Inc., a corporation, and Paskey Dedomenico, an individual, were convicted in this court of violation of the Federal Food, Drug and Cosmetic Act (Docket No. 47116), which conviction had become final before the violation hereinbefore alleged was committed.

All in violation of Title 21, U.S.C., Sections 331 and 333.

Count II.

That the Golden Grain Macaroni Company, Inc., a corporation organized and existing under the laws of the State of California and trading and doing business at Seattle, State of Washington, and Paskey Dedomenico, an individual, at the time hereinafter mentioned president of said corporation, did, within the Northern Division of the Western District of Washington, on or about July 16, 1951, in violation of the Federal Food, Drug and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Seattle, State of Washington, for delivery to Missoula, State of Montana, consigned to County Fair Market, a number of packages containing a food;

That displayed upon said packages, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was, among other things, the following printed and graphic matter:

Golden Grain
Enriched
Cut Macaroni
1 Lb. 8 Oz. Net
Golden Grain Macaroni Co.
San Francisco—Seattle

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was then and there adulterated within

the meaning of 21 U.S.C. 342 (a) (3) in that it consisted in part of a filthy substance by reason of the presence in said food of insect fragments;

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was further adulterated within the meaning of 21 U.S.C. 342 (a) (4) in that it had been prepared, packed and held under insanitary conditions whereby it may have become contaminated with filth;

That on March 14, 1947, the said Golden Grain Macaroni Company, Inc., a corporation, and Paskey Dedomenico, an individual, were convicted in this court of violation of the Federal Food, Drug and Cosmetic Act (Docket No. 47116), which conviction had become final before the violation hereinbefore alleged was committed.

All in violation of Title 21, U.S.C., Sections 331 and 333.

Count III.

That the Golden Grain Macaroni Company, Inc., a corporation organized and existing under the laws of the State of California and trading and doing business at Seattle, State of Washington, and Paskey Dedomenico, an individual, at the time hereinafter mentioned president of said corporation, did, within the Northern Division of the Western District of Washington, on or about July 16, 1951, in violation of the Federal Food, Drug and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Seattle, State of Washington, for de-

livery to Eugene, State of Oregon, consigned to General Grocery Company, a number of packages containing a food;

That displayed upon said packages, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was, among other things, the following printed and graphic matter:

Elbow Macaroni
20 Lbs. Net
Golden Grain Macaroni Co.
Seattle, Wash.

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was then and there adulterated within the meaning of 21 U.S.C. 342 (a) (3) in that it consisted in part of a filthy substance by reason of the presence in said food of insect fragments;

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was further adulterated within the meaning of 21 U.S.C. 342 (a) (4) in that it had been prepared, packed and held under insanitary conditions whereby it may have become contaminated with filth;

That on March 14, 1947, the said Golden Grain Macaroni Company, Inc., a corporation, and Paskey Dedomenico, an individual, were convicted in this court of violation of the Federal Food, Drug and Cosmetic Act (Docket No. 47116), which conviction had become final before the violation hereinbefore alleged was committed.

All in violation of Title 21, U.S.C., Sections 331 and 333.

Count IV.

That the Golden Grain Macaroni Company, Inc., a corporation organized and existing under the laws of the State of California and trading and doing business at Seattle, State of Washington, and Paskey Dedomenico, an individual, at the time hereinafter mentioned president of said corporation, did, within the Northern Division of the Western District of Washington, on or about July 16, 1951, in violation of the Federal Food, Drug and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Seattle, State of Washington, for delivery to Eugene, State of Oregon, consigned to General Grocery Company, a number of packages containing a food;

That displayed upon said packages, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was, among other things, the following printed and graphic matter:

Spaghetti
20 Lbs. Net
Golden Grain Macaroni Co.
Seattle, Wash.

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was then and there adulterated within the meaning of 21 U.S.C. 342 (a) (3) in that it consisted in part of a filthy substance by reason of the presence in said food of insect fragments;

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was further adulterated within the meaning of 21 U.S.C. 342 (a) (4) in that it had been prepared, packed and held under insanitary conditions whereby it may have become contaminated with filth;

That on March 14, 1947, the said Golden Grain Macaroni Company, Inc., a corporation, and Paskey Dedomenico, an individual, were convicted in this court of violation of the Federal Food, Drug and Cosmetic Act (Docket No. 47116), which conviction had become final before the violation hereinbefore alleged was committed.

All in violation of Title 21, U.S.C., Sections 331 and 333.

Count V.

That the Golden Grain Macaroni Company, Inc., a corporation organized and existing under the laws of the State of California and trading and doing business at Seattle, State of Washington, and Paskey Dedomenico, an individual, at the time hereinafter mentioned president of said corporation, did, within the Northern Division of the Western District of Washington, on or about July 26, 1951, in violation of the Federal Food, Drug and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Seattle, State of Washington, for delivery to Anchorage, Territory of Alaska, consigned to J. B. Gottstein Company, a number of packages containing a food;

That displayed upon said packages, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was, among other things, the following printed and graphic matter:

Golden Grain
Enriched
Elbow Macaroni
14 Oz. Net
Golden Grain Macaroni Co.
San Francisco—Seattle

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was then and there adulterated within the meaning of 21 U.S.C. 342 (a) (3) in that it consisted in part of a filthy substance by reason of the presence in said food of insect fragments;

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was further adulterated within the meaning of 21 U.S.C. 342 (a) (4) in that it had been prepared, packed and held under insanitary conditions whereby it may have become contaminated with filth;

That on March 14, 1947, the said Golden Grain Macaroni Company, Inc., a corporation, and Paskey Dedomenico, an individual, were convicted in this court of violation of the Federal Food, Drug and Cosmetic Act (Docket No. 47116), which conviction had become final before the violation hereinbefore alleged was committed.

All in violation of Title 21, U.S.C., Sections 331 and 333.

Count VI.

That the Golden Grain Macaroni Company, Inc., a corporation organized and existing under the laws of the State of California and trading and doing business at Seattle, State of Washington, and Paskey Dedomenico, an individual, at the time hereinafter mentioned president of said corporation, did within the Northern Division of the Western District of Washington, on or about July 26, 1951, in violation of the Federal Food, Drug and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Seattle, State of Washington, for delivery to Anchorage, Territory of Alaska, consigned to J. B. Gottstein Company, a number of packages containing a food;

That displayed upon said packages, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was, among other things, the following printed and graphic matter:

Golden Grain
Thin Spaghetti
Net Wt. 14 Oz.
Manufactured by
Golden Grain Macaroni Co.
San Francisco—Seattle

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was then and there adulterated within the meaning of 21 U.S.C. 342 (a) (3) in that it con-

sisted in part of a filthy substance by reason of the presence in said food of insect fragments;

That said food, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was further adulterated within the meaning of 21 U.S.C. 342 (a) (4) in that it had been prepared, packed and held under insanitary conditions whereby it may have become contaminated with filth;

That on March 14, 1947, the said Golden Grain Macaroni Company, Inc., a corporation, and Paskey Dedomenico, an individual, were convicted in this court of violation of the Federal Food, Drug and Cosmetic Act (Docket No. 47116), which conviction had become final before the violation hereinbefore alleged was committed.

All in violation of Title 21, U.S.C., Sections 331 and 333.

A True Bill.

/s/ [Indistinguishable],
Foreman.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

United States District Court, Western District of Washington, Northern Division

No. 48,518

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GOLDEN GRAIN MACARONI COMPANY, INC.,

Defendant.

JUDGMENT

On the 5th day of December, 1952, the attorney for the Government, and the defendant, Golden Grain Macaroni Company, Inc., a corporation, appearing by its president, Paskey Dedomenico, and by its attorney, Robert A. Yothers, and the defendant having heretofore entered a plea of not guilty and having waived trial by jury, and a trial having been heard to the court without a jury with the consent of the plaintiff, and with the approval of the court, and the court having heard the evidence offered by the plaintiff and the defendant and having heard argument of counsel, now finds:

That the defendant is not guilty of the charge contained in Count I of the indictment and is guilty of the offenses charged in Counts II, III, IV, V and VI of the indictment, to wit: of violations of Sections 331 and 333 of Title 21, U.S.C. (interstate shipment of adulterated food products).

It Is Adjudged that the defendant is guilty as

charged on Counts II, III, IV, V and VI of the indictment and is convicted.

It Is Adjudged that the defendant pay to the United States of America a fine in the sum of $5,000.00, for which let civil execution issue. Provided, that the defendant shall have a period of sixty (60) days from this date in which to pay said fine.

Dated this 8th day of December, 1952.

/s/ EDWARD P. MURPHY,
United States District Judge.

Presented by:

/s/ HARRY SAGER,
Asst. United States Attorney.

[Endorsed]: Filed December 8, 1952.
Entered December 9, 1952.

United States District Court, Western District of Washington, Northern Division
No. 48,518

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PASKEY DEDOMENICO,
Defendant.

JUDGMENT, SENTENCE AND ORDER OF PROBATION

On the 5th day of December, 1952, came the attorney for the Government, and the defendant,

Paskey Dedomenico, appearing in person and by his attorney, Robert A. Yothers, the Court finds the following:

That prior to entering his plea, a copy of the indictment was given the defendant, and the defendant entered a plea of not guilty, and a trial was heard to the Court sitting without a jury, the defendant having waived trial by jury, and such waiver being consented to by plaintiff and approved by the Court; and the Court having heard evidence submitted by the plaintiff and the defendant and having heard argument of counsel, now finds:

That the defendant is not guilty of the charge alleged in Count I of the indictment. That the defendant is guilty of the offenses charged in Counts II, III, IV, V and VI of the indictment, to wit: of a violation of Sections 331 and 333, Title 21, U.S.C. (interstate shipment of adulterated food products).

It Is Adjudged that the defendant is guilty as charged in Counts II, III, IV, V and VI of the indictment and is convicted.

It Is Adjudged that the defendant shall pay to the United States of America a fine in the sum of $5,000.00 and that he shall stand committed until such fine is paid, or until he is otherwise discharged in the manner provided by law. Provided, that the defendant shall have sixty (60) days from the date hereof in which to pay said fine.

The Court being of the opinion that the ends of justice and the best interest of the public as well as the defendant will be subserved by the suspen-

sion of imposition of sentence as to imprisonment of the defendant as to Counts II, III, IV, V and VI.

It Is Adjudged and Ordered that the imposition of sentence as to imprisonment of the defendant is hereby suspended and the defendant is placed on probation for a period of three (3) years commencing this date upon the following conditions:

(1) That he shall report to the United States Probation Officer for this District at the times and in the manner that said officer shall direct.

(2) That he do not violate any law of the United States or of any State or community where he may be.

(3) That he comply with the rules and regulations relating to probation as directed by the Probation Officer and that so long as he shall continue in the food manufacturing business he shall conduct said business in its operations to the satisfaction of said Probation Officer.

Dated this 8th day of December, 1952.

/s/ EDWARD P. MURPHY,
United States District Judge.

Presented by:

/s/ HARRY SAGER,
Asst. United States Attorney.

[Endorsed]: Filed December 8, 1952.

Entered December 9, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEALS

Name and Address of Appellant: Golden Grain Macaroni Company, Inc., 4715 Sixth Avenue South, Seattle, Washington.

Name and Address of Appellant's Attorneys: Pomeroy, Yothers, Luckerath & Dore, 304 Spring Street, Seattle, Washington.

Offense: Violation of Sections 331 and 333 of Title 21, United States Code (interstate shipment of adulterated food products).

Judgment: Entered December 9, 1952, found the appellant guilty as charged on Counts II, III, IV, V and VI of the Indictment, and adjudged that appellant pay to the United States of America a fine in the sum of $5000.00.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 14th day of January, 1953.

/s/ PASKEY DEDOMENICO.

GOLDEN GRAIN MACARONI COMPANY, INC.,

By PASKEY DEDOMENICO,
President.

Name and Address of Appellant: Paskey Dedomenico, 4715 Sixth Avenue South, Seattle, Washington.

Name and Address of Appellant's Attorneys: Pomeroy, Yothers, Luckerath & Dore, 304 Spring Street, Seattle, Washington.

Offense: Violation of Sections 331 and 333 of Title 21, United States Code (interstate shipment of adulterated food products).

Judgment: Entered December 9, 1952, found the appellant guilty as charged on Counts II, III, IV, V and VI of the Indictment, and adjudged that appellant pay to the United States of America a fine in the sum of $5000.00, and placed on probation for a period of three years upon conditions stated in the aforesaid Judgment.

Appellant has sixty days from December 9, 1952, in which to pay said fine or stand committed.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 14th day of January, 1953.

/s/ PASKEY DEDOMENICO.

Presented by:

/s/ HOWARD F. FRYE, of
POMEROY, YOTHERS,
LUCKERATH & DORE,
Attorneys for Appellants.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

MOTION FOR STAY OF EXECUTION AND RELIEF PENDING REVIEW

Comes Now the above-named defendants and each of them in the above-entitled action by and through their attorney, Howard F. Frye, of Pomeroy, Yothers, Luckerath & Dore, and pursuant to Rule 38, Federal Rules of Criminal Procedure, respectfully moves the Court for a stay of execution of judgments entered December 9, 1952, in the above-entitled cause. The following information is furnished:

1. Notice of Appeal was filed January 14, 1953, following entry of Order Denying Motion for New Trial dated January 13, 1953.

2. The defendant, Golden Grain Macaroni Company, Inc., was, by the aforesaid judgment, fined $5000.00.

3. The defendant, Paskey Dedomenico, was, by the aforesaid judgment, fined $5000.00 and placed on probation for a period of three years.

4. The defendants are ready and able to meet such terms as the Court may deem proper and more specifically give bond for the payment of the fines and costs.

Dated this 14th day of January, 1953.

/s/ HOWARD F. FRYE, of
POMEROY, YOTHERS,
LUCKERATH & DORE,
Attorneys for Defendants.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

ORDER TO STAY EXECUTION

The above-entitled defendant's Motion for an Order to Stay Execution of the sentence in the above-entitled cause having come on for hearing in the above-entitled court before the Honorable Judge Edward P. Murphy, United States District Judge, presiding, and J. Charles Dennis, appearing for the plaintiff, and Howard F. Frye of the firm Pomeroy, Yothers, Luckerath & Dore appearing for the defendants, and the court, after hearing argument on said motion and having referred to the files and records herein and being fully advised in the premises, now therefore,

It Is Hereby Ordered that the motion of the defendants be and the same hereby is granted, and the execution of the sentence imposed by the aforesaid judgments herein shall be and the same are hereby stayed.

Done in Open Court this 20th day of January, 1953.

/s/ EDWARD P. MURPHY,
Judge.

Presented and Approved by:

/s/ HOWARD F. FRYE, of
POMEROY, YOTHERS,
LUCKERATH & DORE,
Attorneys for Defendant.

Approved as to Form:

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed January 20, 1953.

[Title of District Court and Cause.]

ORDER REFUNDING CASH BAIL

The above-entitled defendants' motion for an Order Refunding Cash Bail in the above-entitled cause having come on for hearing in the above-entitled court before Judge Edward P. Murphy, United States District Judge, presiding, and it appearing to the court that the defendant Paskey Dedomenico, above named, deposited heretofore in the treasury of this court the sum of Five Hundred ($500.00) Dollars in cash bail and that said cause was subsequently appealed and new bond posted pending appeal, now therefore,

It Is Hereby Ordered that the cash bail so deposited be and is exonerated and the Clerk of this Court is directed to draw a check on the registry of this Court to Paskey Dedomenico in the sum of Five Hundred ($500.00) Dollars.

Done in Open Court this 20th day of January, 1953.

/s/ EDWARD P. MURPHY,
Judge.

Approved and Presented by:

/s/ HOWARD F. FRYE.

Approved by:

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed January 20, 1953.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 48,518

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO, an Individual,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable Edward P. Murphy, United States District Judge.

December 2, 1952—11:15 A.M.

The Clerk: In the matter of United States of America vs. Golden Grain Macaroni Company, and Paskey Dedomenico, an individual, Cause No. 48518, plaintiff being represented by Mr. Harry Sager, the defendants by Mr. Robert Yothers. Parties are now in court, your Honor.

The Court: Proceed. I understand there is a waiver of a jury trial in this case.

Mr. Yothers: That is correct.

The Court: Do you consent, Mr. Sager?

Mr. Sager: Yes, the Government consents if the Court approves.

The Court: You are representing on behalf of your clients that they consent to the waiver?

Mr. Yothers: That is correct, your Honor; both defendants have signed the waiver.

The Court: Very well. Proceed. [3*]

* * *

Mr. Sager: If your Honor please, one of the allegations of the indictment is that the defendant, Golden Grain Macaroni Company, is a corporation organized under the laws of the State of California and doing business at Seattle, and that the individual defendant, Paskey Dedomenico, is president and general manager of the corporation. I understand that the defendant stipulated as to those facts.

Mr. Yothers: That is correct; the defendants will so stipulate, your Honor. [4]

* * *

ARTHUR G. EDWARDS

being first duly sworn on oath, was called as a witness on behalf of the plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. Your name is what?

A. Arthur G. Edwards.

Q. And where do you live?

A. 2209 Fairview North.

Q. What is your occupation?

A. Paymaster and assistant office manager at West Coast Fast Freight.

Q. What is the business of West Coast Fast Freight?

***Page numbering appearing at foot of page of original Reporter's Transcript of Record**

(Testimony of Arthur G. Edwards.)

A. Motor carrier in inter and intrastate shipments.

Q. In your capacity as assistant office manager, do you have custody of the records of that concern?

A. That is correct.

Q. Have you brought certain of those records here? A. Yes, I have.

The Clerk: Plaintiff's Exhibits 2 and 3 marked for identification.

Q. Mr. Edwards, I am showing you Plaintiff's Identifications 2 and 3. What are the documents?

A. These are bills of lading covering shipments. Used as a shipping document. [18]

Q. Are they original records from your concern?

A. That is correct, they are.

Q. Kept in the usual and ordinary course of business? A. That is correct.

Q. And as a permanent record? A. Yes.

Q. And how do these bills of lading reach your concern? A. You mean in the custody of——

Q. No, how do you get them originally?

A. They were picked up by our pickup driver and brought in with the shipment covering the movement.

Q. Picked up where?

A. At, I would imagine, at the, from the shipper.

Mr. Yothers: I object to this testimony. The man is not qualified to know where the driver—he wasn't with him. It is based on hearsay and I move that the answer be stricken.

(Testimony of Arthur G. Edwards.)

The Court: Motion denied. I assume he is familiar with the general customs and practices of his operations.

Q. Are you? A. Yes.

Q. Does your concern pick up its freight at the business of the shipper? [19]

A. That is correct.

Q. And then how is it handled from there?

A. These documents are brought in with the shipment and presented at the dock for loading outgoing.

Q. Calling your attention to Exhibit 2, it represents a shipment of freight from what point to what point?

A. Shipped from Seattle to Missoula, Montana.

Q. And the date? A. July 16, 1951.

Q. Who is the shipper?

A. Shipper? Golden Grain Macaroni.

Q. And as to Exhibit for Identification 3, what shipment does it represent?

A. Shipped from Golden Grain Macaroni to the General Grocery at Eugene, Oregon.

Q. And the date? A. July 16, 1951.

Q. Now, were the shipments described on these documents actually shipped on those routes?

A. Yes.

Q. And what date would they be shipped on?

A. They would move on the 16th of July.

Q. The date shown on the documents?

A. That is correct.

Mr. Sager: We will offer Exhibits 2 and 3. [20]

(Testimony of Arthur G. Edwards.)

The Court: They will be received and marked.

Mr. Yothers: Mr. Edwards, did you prepare these bills of lading?

The Witness: No, I didn't.

Mr. Yothers: Do you know who did prepare them?

The Witness: No.

Mr. Yothers: Do you know whether or not they were prepared by Mr. Dedomenico or Golden Grain Company?

The Witness: No, I don't.

Mr. Yothers: I object to the introduction of these, your Honor, on the grounds it is hearsay.

The Court: Objection will be overruled. They are bills of lading which are kept in, I assume, the ordinary course of business, and such records are properly admissible. These are your regular forms —what do you call them, bills of lading?

The Witness: Yes, sir.

The Court: They will be received and marked.

(Plaintiff's Exhibits 2 and 3 marked for identification and admitted in evidence over objection.) [21]

Cross-Examination

By Mr. Yothers:

Q. Mr. Edwards, as I understand, you did not prepare these bills of lading?

A. That is correct.

Q. And you don't know who did prepare them?

(Testimony of Arthur G. Edwards.)

A. No.

Q. Even though they are part of your own records and everything? A. That is correct.

Mr. Yothers: For the purpose of the record, your Honor, may I again resume my objection?

The Court: The objection is again [22] overruled.

* * *

EVERETT LEWIS PURDY

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. Your name please?

A. Everett Lewis Purdy.

Q. Where do you live Mr. Purdy?

A. 2841 W 60th.

Q. And in 1951, in July of 1951 by whom were you employed?

A. West Coast Fast Freight Lines.

Q. Is that the same concern that Mr. Edwards has testified about? A. That is correct.

Q. And what were your duties?

A. I was in charge of operation on the triangle, Wenatchee, Spokane and Yakima.

Q. You say you were what? In charge of operations of that run? A. Operations of loading.

Q. Oh, I see. Do you recognize the document which is now Plaintiff's Exhibit 2?

A. Yes, I do.

(Testimony of Everett Lewis Purdy.)

Q. In connection with the shipment represented by that [23] document, do you recall an inspector of the Food and Drug Administration being there?

A. Yes, I do.

Q. And what did he do with respect to that shipment?

A. Well, I know that I had to stop operations of loading this special truck in order that we could dig out the macaroni. It had already been loaded.

Q. And then what was done?

A. Well, he had to go up to the office to get the bill of lading that I had already sent in, and he took a couple of samples. I imagine that is what he done.

Q. Well, did you see him take samples?

A. That is right.

Q. From this shipment represented by that bill of lading? A. That is right.

Mr. Sager: You may inquire.

Cross-Examination

By Mr. Yothers:

Q. You say you saw him take the samples?

A. Yes, sir.

Q. What did he do when he took the samples?

A. He just opened them up and took the packages and went over to the dog house, and we just stood around and waited. [24]

Q. Over to where?

(Testimony of Everett Lewis Purdy.)

A. Over to—well, it's a little shack on the dock; that is where the bills are segregated.

Q. What did he do with the samples at that time?

A. Well, I don't know what he done then. I didn't watch him.

Q. I see. A. I went on about my work.

Q. After he actually took the samples themselves, you don't know what he did with them?

A. No, I don't know what he done with them.

Q. Were those samples loose?

A. I had to open up the packages.

Q. You opened up the packages?

A. He did.

Q. Did he take out full packages or partial packages, or what?

A. I don't remember that.

Q. Now, when you say he took a sample from the shipment counsel asked you if that was a shipment represented by that bill of lading. How do you know that shipment was represented by that bill of lading?

A. Well, it had to be because I had to check it before it went into the truck.

Q. You did check it? [25]

A. That is right.

Q. How many cases of macaroni were there?

A. Forty-nine (49).

Q. That is what the bill of lading says?

A. That is right.

Q. Did you check it at that time?

(Testimony of Everett Lewis Purdy.)

A. That is right. All freight is checked before it is put into the truck.

Q. What was the destination of it?

A. Missoula, Montana.

Q. And you got that information, did you, from the bill of lading? A. That is right.

Q. You don't know that of your own knowledge outside of the bill of lading itself?

A. How do you mean?

Q. I mean, this information as to where it was going and where it was from, you got that from the bill of lading? A. That is right.

Q. Do you know who prepared the bill of lading?

A. No, I don't know who prepared it. [26]

* * *

WILLIAM PUGH

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name, please.

A. William Pugh.

Q. P-u-g-h? A. Right.

Q. Where do you live, Mr. Pugh?

A. 3904 South 166th.

Q. In Seattle? A. Right.

Q. And by whom were you employed in July of 1951? A. West Coast Fast Freight.

(Testimony of William Pugh.)

Q. And what was the nature of your employment there?

A. I was loading foreman, checker and loading foreman for California and southern Oregon sector.

Q. Showing you plaintiff's Exhibit 3, Mr. Pugh, do you recognize this document? A. Yes, sir.

Q. Did you have anything to do with that document on that date?

A. Yes, I did as I loaded this particular shipment.

Q. In connection with that was there an inspector from [27] the Food and Drug Administration there? A. Yes, there was.

Q. What did he do with respect to that shipment?

A. What I did, the way we handle our freight is on a pallet board with lift truck. I put this pallet to one side so he could inspect this particular shipment before we loaded it.

Q. Did he take samples of the shipment?

A. Yes, sir.

* * *

Cross-Examination

By Mr. Yothers:

Q. What was the date of this, Mr. Pugh?

A. 7/16/51.

Q. July 16, 1951. Do you recall the name of the inspector? A. No, I didn't know his name, no.

Q. Did you observe him when he actually took the samples themselves? A. Yes.

(Testimony of William Pugh.)

Q. Did you observe how he did it, what manner he did it? A. No, I didn't.

Q. Do you know what he did with the samples after he got them? [28] A. No.

Q. The samples that he took, were they in open bags or were they closed bags, or——

A. I don't remember.

Q. You didn't observe that? A. No.

Q. Mr. Pugh I will ask you whether or not, did you have anything to do with the preparation of that Exhibit 3, that bill of lading? A. No.

Q. You don't know who prepared it?

A. No, I don't. [29]

* * *

EDWIN A. GARDNER

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name.

A. Edwin A. Gardner.

Q. Where do you live?

A. 2322-37th S.W., Seattle.

Q. What is your occupation?

A. Manager, Coastwise Line.

Q. Where is your office?

A. Ames Terminal, 3200-26th S.W.

Q. As manager, did you have custody of the records of that concern?

(Testimony of Edwin A. Gardner.)

A. Yes, I do, sir.

Q. And you brought certain of those records here? A. Yes, I have.

Q. What is the business of that—what is the nature of its business, your concern's business?

A. Operation of steamship service from Seattle to Alaska.

Q. And in that capacity do you handle freight and shipments from Seattle to Alaska?

A. Yes, we do, sir. [30]

Q. May I have the records you brought?

The Clerk: Plaintiff's Exhibit 4 for identification.

Q. Mr. Gardner, showing you plaintiff's identification 4, will you state generally what the exhibit is?

A. Well, this exhibit is a copy of the original bill of lading made out by the shipper in Seattle to Anchorage, Alaska.

Q. And is this exhibit a permanent record of your company?

A. Yes, sir, this copy is a permanent record for our office, the only one we have.

Q. And that is kept in the usual and ordinary course of the business of your company?

A. It is kept according to shipment in the office, yes, sir.

Q. Now, does it—there is a whole series of documents there, of course, does it show a shipment from Seattle to Alaska?

(Testimony of Edwin A. Gardner.)

A. It shows a very large shipment from Seattle.

Q. By boat? A. By boat.

Q. And what is the date of that shipment?

A. The date of that shipment is July 31, 1952.

Q. Does the record, the document show who, where [31] the shippers shipped goods in that shipment? A. Yes, sir, it does.

Q. And is one of them Golden Grain Macaroni Company?

* * *

A. I want to make the correction, it is 1951. Excuse me.

Q. Do the documents show Golden Grain Macaroni Company to be a shipper?

Mr. Yothers: I object to this testimony, your Honor. The documents speak for themselves and are the best evidence.

The Court: Objection overruled.

A. The Golden Grain Company was a shipper in connection with this particular shipment.

Q. And who was the consignee of the shipment made by Golden Grain Macaroni Company?

A. The consignee was J. B. Gottstein Company, Anchorage, Alaska.

Mr. Sager: We will offer the exhibit.

Mr. Yothers: Mr. Gardner, do you know of your own knowledge that the Golden Grain Macaroni Company prepared that bill of lading or that [32] Mr. Dedomenico prepared that bill of lading?

The Witness: No, I do not.

Mr. Yothers: You don't know who prepared it

(Testimony of Edwin A. Gardner.)

then? It could have been prepared by anybody, is that correct?

The Witness: No, it could have been prepared by either that company or the J. B. Gottstein Co., one or the other.

Mr. Yothers: I see. You don't know whether it is the J. B. Gottstein Company or Mr. Dedomenico or the Golden Grain Company who prepared this bill of lading?

The Witness: No, I do not, sir.

Mr. Yothers: I object to the introduction of the exhibit, your Honor, on the grounds that it has not been properly identified, no foundation laid for its introduction, and further, so far as the defendants herein are concerned, that it is hearsay.

The Court: Objection will be overruled. It goes to the weight of the evidence; indicates the shipment was made. For that purpose it will be received.

(Plaintiff's Exhibit No. 4 marked for identification and admitted in evidence over [33] objection.)

Q. Mr. Gardner, were the goods described in this document actually shipped to Alaska?

A. Yes they were actually shipped to Alaska on that vessel shown on that bill of lading.

Q. Now, where in the document is the portion which shows the part of the shipment made by Golden Grain Macaroni?

Mr. Yothers: I object, your Honor to the form of the question because it is assuming a fact that

(Testimony of Edwin A. Gardner.)

this witness has already testified that he is not qualified to give any testimony on it, that is, he does not know if the shipment was made by the Golden Grain Macaroni Company or J. B. Gottstein. The form of the question assumes that as to fact.

The Court: The objection will be overruled.

A. The Golden Grain Macaroni Company or the J. B. Gottstein Company make up a bill of lading which we call a memo bill of lading. It comes to us to Ames Terminal either by messenger or mail. That is consolidated into a master bill of lading which includes the Golden Grain Macaroni Company shipment as well as many others originating from many other different shippers and then consolidated into one bill of lading to J. B. Gottstein Company, Anchorage, Alaska.

Q. Now then, is there something in the document to [34] show what part of the master bill of lading came from Golden Grain or was shipped by Golden Grain Macaroni Company?

Mr. Yothers: Same objection to this question, your Honor, as previously stated.

The Court: Same ruling.

A. The memo bill of lading shows three (3) items, spaghetti, macaroni and rice shipped by either and made out by either of the two companies mentioned and consolidated into the master bill of lading. We have that record and the signature of the checker receiving that cargo which is, as I stated, consolidated into the master bill of lading.

(Testimony of Edwin A. Gardner.)

Q. Now, you have designated one of these documents which has the shipper as Golden Grain Macaroni Company? A. Yes, sir.

Q. And the product then described in that document is the part of their shipment or the part of the whole shipment which was shipped by Golden Grain Macaroni? A. That is correct, sir.

Mr. Sager: I think possibly for the convenience of the Court it may be well if we identified that particular document as plaintiff's Exhibit 4-A.

Mr. Yothers: Can we extract that from the bill of lading? It might be simpler.

Mr. Sager: I think the whole document [35] should stay together. It is just a matter of——

The Clerk: This document? Plaintiff's Exhibit 4-A for identification.

Mr. Sager: We will offer that. Well, the whole exhibit is in.

The Clerk: Yes it is. We will mark it as 4-A then.

Mr. Sager: Very well.

* * *

(Plaintiff's Exhibit No. 4-A marked for identification and admitted in evidence as a part of Plaintiff's Exhibit No. 4.)

Cross-Examination

By Mr. Yothers:

Q. Mr. Gardner, as I understand your testimony as to Exhibit 4 and as to Exhibit 4-A, that exhibit

(Testimony of Edwin A. Gardner.)

represents a bill of lading which could have been prepared or might have been prepared by either J. B. Gottstein Company or by Golden Grain Macaroni, is that correct?

A. The memo could have been prepared by [36] either.

Q. And it might have been received by you by messenger or by mail, is that right?

A. Yes, sir, that is correct.

Q. Or by telegram?

A. No, by messenger or by mail.

Q. By mail. And you do not know which of the two concerns prepared it, is that correct?

A. That is correct.

Q. Nor do you know at this time in what manner you received it? A. In what manner?

Q. In what manner, whether by messenger or by mail?

A. We received this particular one by messenger.

Q. Now, I think you testified, Mr. Gardner, that this shipment was sent to Alaska, is that correct?

A. That is correct.

Q. By this shipment are you referring now to those matters which are contained in Exhibit 4-A? Is it your testimony that they went to Alaska?

A. 4-A and 4 both.

Q. I am speaking particularly now of the macaroni and spaghetti products referred.

A. Yes, they went to Alaska.

Q. You are certain of that?

A. I am certain of that, sir. [37]

(Testimony of Edwin A. Gardner.)

Q. This J. B. Gottstein Company, do you know of your own knowledge, Mr. Gardner, whether or not it is in any way connected with the Golden Grain Macaroni Company, or do you know?

A. No, I do not know whether they are connected in any way. I doubt very much if they [38] are.

* * *

EDWARD HYATT

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name. A. Edward Hyatt.

Q. What is your address?

A. 6733-46th Avenue S.W.

Q. What is your occupation?

A. Assistant Dock Superintendent at Ames Terminal.

Q. And what are your duties in that capacity?

A. I supervise the receiving and delivering of cargo.

Q. That is the same concern that Mr. Gardner testified about?

A. No, Mr. Gardner works for the Coastwise Line.

Q. Oh, excuse me. Well, does that operate at Ames Terminal?

A. They operate out of the Ames Terminal.

(Testimony of Edward Hyatt.)

Q. Were you present when this cargo was made up and shipped?

A. I was present when the Golden Grain portion was.

Q. The portion of the shipment represented by this document? A. That is right. [39]

Q. On that occasion was there an inspector from the Food and Drug Administration there?

A. There was.

Q. And what did he do with respect to this part of the shipment that was from Golden Grain Macaroni Company?

A. He asked my permission to take samples of this particular shipment.

Q. Did he do so? A. He did.

Q. Do you remember what his name was?

A. No, I don't. [40]

* * *

JAMES A. FORD

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name, please.

A. James A. Ford.

Q. Where do you live?

A. 5220-40th S.W.

Q. What is your occupation?

(Testimony of James A. Ford.)

A. I am inspector with the Food and Drug Administration.

Q. How long have you been employed in that capacity? A. Nearly two years.

Q. Did you have occasion to take a sample of a product involved in one of the shipments in this case? A. Yes, I did.

Q. Which one was it and what is it?

A. Well, it was a shipment to County Fair Market, Missoula, on July 16, 1951.

Q. And where did you take your sample?

A. At West Coast Fast Freight docks. From one of the trailers.

Q. And who from that company was present at the time?

A. Well, Mr. Purdy was present.

Q. Now, did you on that occasion, did you examine the [41] bill of lading.

A. Yes, I did.

Q. With respect to that shipment?

A. Yes, I made copies of it.

Q. You say that was the shipment to Missoula?

A. Yes.

Q. Showing you Plaintiff's Exhibit 2, is that a copy of the bill of lading that you saw at that time?

A. This is the original bill of lading that I copied. It has my initials and date on the back.

Q. Now, did you examine this shipment, this whole shipment to see at least what it was?

(Testimony of James A. Ford.)

A. I examined much of it. I couldn't examine it all because it was loaded on a trailer.

Q. Oh, I see. Generally what was the nature of the shipment?

A. It was macaroni products, macaroni and spaghetti products, and there was five (5) cases of beans in the shipment.

Q. With respect to the macaroni, what was that packaged in?

A. It was packaged in cellophane bags in cardboard containers.

Q. Cartons? A. Yes. [42]

Q. And how did you take the sample?

A. I took twelve (12) packages, took two (2) from each of six (6) different cases.

Q. How many cases of the macaroni were there?

A. Forty-four (44).

Q. Forty-four (44) cases? A. Yes.

Q. And what were the size of the bags?

A. One pound six ounces (1 lb. 6 oz.) were the ones that I sampled.

Q. Was it any particular type or brand of macaroni? A. Elbow macaroni.

Q. Now, what did you do with these bags that you took as a sample?

A. I put them in one of the original shipping containers that I had filled back from the boxes I had taken the other samples from, and took it back to the office, wrote up a collection report, put it under my seal, seal with my name on it and turned it in to our Seattle laboratory.

(Testimony of James A. Ford.)

Q. And do you give that then a sample number?

A. We do.

Q. And what was that? A. 30-340 L. [43]

* * *

Cross-Examination

By Mr. Yothers:

Q. Where did you say you got these samples from, Mr. Ford?

A. Well, from one of the trailers at the West Coast Fast Freight dock.

Q. Did you inspect the trailer? [44]

A. Did I inspect the trailer?

Q. Yes.

A. It was nearly loaded, better than half loaded.

Q. By that you mean you did not inspect the trailer?

A. What do you mean by inspecting the trailer?

Q. Well, did you examine the trailer; did you inspect it?

A. I don't know what you mean. I looked at the trailer, yes.

Q. Did you examine the inside of the trailer. Did you determine from your examination or inspection as to the cleanliness or sanitary condition of the trailer?

A. Yes, the trailer was lined. It was a fairly new trailer and it was entirely lined with a tongue and groove, I think, fir, tongue and groove siding, and it was reasonably clean, yes.

Q. Reasonably clean? A. Yes.

(Testimony of James A. Ford.)

Q. What do you mean by reasonably clean?

A. Well, there is a certain amount of dirt that would track in on the floor from the dock. What I mean, just dirt from the loading dock.

Q. Did you examine the warehouse or the dock or wherever it was they had this product stored?

A. I did not make a detailed examination, [45] no.

Q. At the time you took the samples, this particular sample, Mr. Ford, did you determine whether or not there were any insects in the product? Did you see any visually?

A. No, I could not see any visually.

Q. Did you look at it? A. Yes, I did.

Q. Was it in cellophane bags? A. Yes.

Q. And could you determine whether or not the product was moldy?

A. I did not see any mold.

Q. Was it in any way offensive to odor?

A. I couldn't smell through the cellophane bag.

Q. Or to taste?

A. I didn't taste any of it. I didn't open the cellophane bags at all.

* * *

Redirect Examination

By Mr. Sager:

Q. I presume these bags were sealed?

A. Yes, they were.

Q. Cellophane bags? A. Yes.

Q. How was the carton sealed? [46]

(Testimony of James A. Ford.)

A. The carton was regular double flap glued shut, tight fitting cardboard carton.

Q. These cartons were all closed, were they?

A. Yes, they were.

Q. Until you opened them to take the samples?

A. Yes, then I glued them back after I had taken the samples. [47]

* * *

CHARLES M. CHAMBERS

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name.

A. Charles M. Chambers.

Q. And where do you live?

A. 9123-25th Avenue N.E., Seattle, Washington.

Q. You are employed by whom?

A. United States Food and Drug Administration.

Q. How long have you been with them?

A. Since December 8, 1950.

Q. In what capacity? A. Inspector.

Q. Did you have occasion to take samples from the products involved in the shipments in this case?

A. I did.

Q. What shipments were they? [48]

* * *

(Testimony of Charles M. Chambers.)

Q. Now, did you take a sample from another of these shipments? A. I did.

Q. Which one was that?

A. The shipment on the Ames Terminal dock in Seattle. That was taken on July 26, 1951. [49]

Q. Did you see any of these documents at that time represented by plaintiff's Exhibit 4 in connection with that sample? A. Yes, I did.

* * *

Q. From what part of the shipment represented by that exhibit did you take your samples?

A. I took the part that was being shipped by the Golden Grain Macaroni Company to J. B. Gottstein Company, Anchorage, Alaska.

Q. And what did that shipment consist of?

A. It consisted of macaroni products.

Q. How many cases were there?

A. There were originally twenty (20) cases of elbow macaroni and twenty-five (25) cases of spaghetti.

Q. And did you sample from each?

A. In the twenty (20) case lot of elbow macaroni I sampled from six (6) different cases.

Q. What sample did you take from those?

A. I took two (2) packages from each of the six (6) cases.

Q. This is the elbow macaroni you are talking about?

A. This is the elbow macaroni, that is [50] correct.

(Testimony of Charles M. Chambers.)

Q. What was the size and nature of the packages?

A. They were fourteen ounce (14 oz.) packages. There were twelve (12) of these packages in each case.

Q. What kind of package was it?

A. They were cellophane wrapped packages.

Q. Now, with respect to this spaghetti, how many cases of that were there?

A. Of spaghetti there were twenty-five (25) cases.

Q. What sample did you take from that?

A. From that lot I took twenty-four (24) packages.

Q. And how many cases?

A. There were six (6) cases sampled.

Q. And what was the nature and size of those packages?

A. They were fourteen ounce (14 oz.) packages and there were twenty-four (24) of these in each case.

Q. And what was the nature of the wrapping or package?

A. They were cellophane wrapped packages.

Q. Were they sealed?

A. They were sealed.

Q. All of these that you have been talking about?

A. That is correct.

Q. And how was the carton bound together?

A. The carton was sealed closed.

(Testimony of Charles M. Chambers.)

Q. Now what did you do with the samples that you took [51] from both the Lewiston, Idaho, shipment and this Anchorage shipment?

A. In each case I placed the samples in an original shipping carton, sealed the shipping carton with my sample number and my signature and the date and submitted it to the Seattle laboratory of the United States Food and Drug Administration.

Q. What do you mean by submit?

A. I handed it to the storekeeper of the lab.

Q. What sample numbers did you give these—what did you have, two (2) samples? Then two (2) different samples?

* * *

A. The other two (2) samples taken from Ames Terminal were given the numbers 29-477 L and 29-478 L.

Q. One of those was spaghetti and the other macaroni?

A. Yes. The first number was given the macaroni shipment and the second, the spaghetti shipment.

* * *

Cross-Examination

By Mr. Yothers:

Q. Mr. Chambers, you indicated that these samples that you took were in cellophane wrapped packages. Were you able to observe the contents of the packages therefore?

A. I could see through the wrap and see the product in the package, yes, sir.

(Testimony of Charles M. Chambers.)

Q. Did you observe any mold on the product in either case, any of the three (3) cases?

A. I observed no mold.

Q. Did you observe any insect fragments?

A. I could see no indication of insect fragments.

Q. Was the product in each of the three (3) cases offensive to odor?

A. I could detect no odor.

Q. Was it offensive to taste?

A. I did not taste the product.

Q. As nearly as you could determine, sir, on the basis of your inspection the product did not contain any filth?

Mr. Sager: I object to that.

The Court: Overruled.

A. To my visual examination I could not see filth in the product.

Q. And that same thing is true of the sample that [53] you took down at the Ames Terminal, of the macaroni?

A. That would apply to that shipment also.

Q. And would it also apply to the sample you took down at the Ames Terminal relative to the spaghetti? A. That is correct.

Q. Did you make an inspection of the shipping warehouse or of the shipping facilities at the time you made and took the sample at the Inland Motor Freight?

A. I did not make a complete inspection at that time, no.

(Testimony of Charles M. Chambers.)

Q. You are not able then, therefore, to say the condition as to sanitation or cleanliness of that facility?

A. I can state that the area where the shipments were located in each of the three (3) samples was free of other than extraneous dirt present on the docks.

Q. I see. What do you mean by extraneous dirt?

A. The normal litter present on a dock during the course of a day.

Q. Would you say it was clean, sanitary?

A. It was as sanitary as the docks are usually.

Q. Well, are they sanitary?

A. Yes, for all ordinary purposes.

Q. Are they sanitary for the purposes of shipping foods such as macaroni and spaghetti?

A. Yes, where the product is cased as these shipments were. [54]

Q. And did you make an inspection, sir, of the dock facilities at the Ames Terminal dock and at the warehouse?

A. I did not make a complete inspection of that dock.

Q. That is in both instances, of the macaroni and the spaghetti? A. Yes.

Q. You indicated, Mr. Chambers, that you took a part of the shipment which you said was shipped by Golden Grain to Gottstein of Anchorage. What is your basis for your statement, sir, that that prod-

(Testimony of Charles M. Chambers.)

uct was shipped by Golden Grain to Gottstein of Anchorage?

A. The bill of lading record I obtained from Mr. Hyatt which he identified as covering that shipment; he gave me that information.

Q. You don't know of your own knowledge then that it was shipped by Golden Grain Macaroni to Gottstein?

A. To the best of my knowledge it was.

Q. The basis of that knowledge is what Mr. Hyatt told you and the bill of lading?

A. The bill of lading and Mr. Hyatt.

Q. Do you know who prepared the bill of lading, sir? A. I do not know that.

Q. Might it have been prepared by the Gottstein Company? A. I don't know that, sir. [55]

* * *

Redirect Examination

By Mr. Sager:

Q. Is there anything on the shipping cases to indicate from whom they came?

A. Yes, the name Golden Grain Macaroni was stenciled on the cases in each shipment.

Q. As what——

A. I have a portion of that label right here, "Golden Grain Macaroni Products."

Mr. Yothers: I object. I think the best evidence is the label itself.

The Court: Objection sustained.

Q. May I see what you have?

A. Yes, certainly.

(Testimony of Charles M. Chambers.)

Q. From what did you get this?

A. That was obtained from the case that I submitted to the laboratory, one of the original cases from that shipment.

Q. That is a part of the case?

A. That is correct.

The Clerk: Plaintiff's Exhibit 5 for identification, and 6 for identification.

Q. Showing you plaintiff's Exhibit 5 for identification, Mr. Chambers, what is that exhibit?

A. That is a portion of a case of a lot of [56] macaroni, elbow macaroni, which I sampled at Ames Terminal on July 26, 1951.

Q. That is part of the original shipping carton, is that right? A. Yes, that is correct.

Mr. Sager: We will offer the exhibit.

The Clerk: Plaintiff's Exhibit 7 for identification.

Q. Showing you plaintiff's Exhibits 6 and 7, what are they?

A. These are the cellophane wraps from the packages of the elbow macaroni and—of the elbow macaroni in that shipment.

Q. Are both of the elbow macaroni?

A. The product, yes the product is labeled as elbow macaroni, that is correct.

Q. Both exhibits 6 and 7 are the same?

A. They are both labeled the same.

Q. What I mean, they are both parts of the bags or containers of the product you took as a sample?

A. Yes, that is correct.

(Testimony of Charles M. Chambers.)

Mr. Sager: We will offer 6 and 7. One further question.

Q. Are these from the same shipment as represented by Exhibit 5, the carton? [57]

A. That is correct, yes.

Mr. Yothers: Excuse me, Mr. Chambers, I didn't understand your answer to the question. Are these the bags from which you took the samples?

The Witness: No, those are bags which contained the product that I sampled. I sampled the product when it was in those bags.

Mr. Yothers: I am afraid I don't understand, Mr. Chambers. There was in this one, for example, elbow macaroni and in this one, both of them, elbow macaroni. Then you mean you took the macaroni out of these bags and used them for samples?

The Witness: That is incorrect. I did not. The analyst removed the product in the laboratory. It was——

Mr. Yothers: All right.

The Witness: It was sealed in the original bags and handed to them.

Mr. Yothers: You took these bags to the analyst and he returned the bags to you, is that right?

The Witness: He retained those bags, yes. We kept those in our office.

Mr. Yothers: When did you get them back? [58]

The Witness: I received them yesterday.

The Court: They are offered, is there an objection?

Mr. Yothers: Yes, I object to Exhibits 5, 6 and

(Testimony of Charles M. Chambers.)

7, your Honor, on the ground that they are not properly identified and in no way connected with the defendants in this matter, immaterial.

The Court: Objection will be overruled. They will be received in evidence.

(Plaintiff's Exhibits Nos. 5, 6 and 7 marked for identification and admitted in evidence over objection.) [59]

* * *

KENNETH E. MONFORE

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name.

A. Monfore, Kenneth E.

Q. Where do you live, sir?

A. I live in Bellevue, Washington.

Q. Your occupation?

A. I am Chief of the Seattle District of the Food and Drug Administration.

Q. Mr. Monfore, under the Food and Drug Act there is some provision for citing prospective defendants before criminal charges are filed?

A. That is correct.

Q. In this case did you issue a citation?

A. I did.

Q. Under that provision of the law?

(Testimony of Kenneth E. Monfore.)

A. I did.

Q. To whom did you issue it?

A. I issued a citation or the form is called a notice of hearing to the Golden Grain Macaroni Company, Inc., to Mr. Paskey Dedomenico and to Mr. McDiarmid.

Q. And generally what does the notice [60] require?

Mr. Yothers: I object to this, your Honor. I don't see that it is material.

The Court: I think it is. I am interested in becoming enlightened upon that subject. The objection will be overruled.

A. The nature of that notice is giving an opportunity to persons to whom it is addressed to appear or to respond in writing or through an attorney, as they may desire, at a time specified, to give information which they believe is pertinent to the alleged violation of the Act. The notice contains information regarding shipments which we allege the firm is responsible for and a charge sheet showing the alleged violation of the sections of the Act. It is an opportunity for the ones to whom it is addressed to present the information they desire on a date specified.

Q. And to whom do they present that information?

A. Well, the form gives a place and time. In my case it is the Seattle office of the Food and Drug Administration.

(Testimony of Kenneth E. Monfore.)

Q. Now, when did you give this notice to the defendants and to Mr. McDiarmid?

Mr. Yothers: I object to that, your Honor. I think the best evidence is the notice itself and it should be produced.

The Court: Do you have a copy of the notice, Mr. Monfore? [61]

The Witness: Yes, I have my file copy.

The Court: I assume the original was received by the defendants?

The Witness: That is right.

* * *

Q. (Continuing): Did anybody appear in response to that notice? A. Yes, they did.

Q. Who did?

A. Mr. Paskey Dedomenico and McDiarmid.

Q. And where did they appear?

A. In my office at 501 Federal Office Building here in Seattle.

Q. And who was present besides Mr. Dedomenico and Mr. McDiarmid?

A. I was present and my assistant, Mr. Lofsvold.

Q. Now at that time did you have some conversation with Mr. Dedomenico and Mr. McDiarmid? A. Yes, I did.

Q. During the course of that hearing or conversation was there anything said with respect to Mr. Dedomenico's authority in connection with the company? A. Yes.

Q. What was that?

(Testimony of Kenneth E. Monfore.)

A. Mr. Dedomenico stated that he was president and [62] manager of the Golden Grain Company, Inc., a California corporation, manager of the Seattle plant.

Q. Did anybody appear at this hearing for the corporation? A. Mr. Dedomenico did.

Q. As president? A. That is correct.

Q. Was there anything said during that hearing with respect to who is in charge of the plant in the absence of Mr. Dedomenico?

A. Yes, there was.

Q. What was that?

A. That Mr. McDiarmid who was sales manager of the Seattle plant acted as manager when Mr. Paskey Dedomenico was not present.

* * *

Cross-Examination

By Mr. Yothers:

Q. When was this so-called hearing held, Mr. Monfore? A. January 17, 1952.

Q. 1952, some seven (7) months after the date of the last—taking the last sample?

A. Approximately that.

Q. And you say that was attended by Mr. [63] Dedomenico and who? A. McDiarmid.

Q. Did you at that time have any discussion with Mr. Dedomenico, sir, as to his authorization to appear and act on behalf of the Golden Grain Macaroni Company?

A. In this way, the notice of hearing is addressed to the three that I mentioned, the corporation, to Mr. Paskey Dedomenico as an individual and to Mr.

(Testimony of Kenneth E. Monfore.)

McDiarmid as an individual. At the close of the hearing I asked the specific question of those present, Mr Dedomenico and Mr. McDiarmid, if the response which they had given to me and which I dictated in their presence was the response as to the corporation as well as to themselves as individuals and they stated that it did.

Q. Do you have those minutes present?

A. What?

Q. Do you have the minutes of that hearing?

A. I have my file copy of it.

Q. Do you have it here in the courtroom?

A. I do.

* * *

Q. Was there any resolution passed on behalf of any of the stockholders or the Board of Directors of the corporation authorizing Mr. Dedomenico to appear on behalf [64] of that corporation?

A. I don't know that. I didn't inquire.

Q. Now, what did you ask Mr. Dedomenico as to his being present here in the city of Seattle on June 26th of 1951?

A. I didn't ask him as to whether he was present at that time.

Q. Do you know whether or not he was present or did you have any conversation at this time as to whether he was present?

A. I recall that he made a statement during the hearing that he was absent from Seattle during a period which, as I recall it, was from sometime around the latter part of June until, I believe,

(Testimony of Kenneth E. Monfore.)

around July 25, 1951. That was a part of his response at the hearing.

Q. And what did you ask him that elicited that response, sir?

A. I don't recall that I asked him anything in particular about that.

Q. He just volunteered that information?

A. That is correct.

Q. Did he not at that time advise you that he had instructed all the employees that there were to be no inspections without his personal permission by the inspectors of the Food and Drug Administration. [65] A. Not at that time.

Q. You don't recall him stating that?

A. No, sir.

Q. Did Mr. McDiarmid advise you of that?

A. No, he didn't.

Q. What was the occasion or what question did you ask of him that brought the response that you testified to that Mr. McDiarmid was in charge when Mr. Dedomenico was not present?

A. Towards the beginning of the hearing I simply inquired of them as to their position. They stated what it was.

Q. And he told you he was the president and general manager of the Golden Grain Macaroni Company here in Seattle? A. That is correct.

Q. And that Mr. McDiarmid was the sales manager, is that correct? A. That is correct.

Q. He advised you of the other officers of the

(Testimony of Kenneth E. Monfore.)

corporation or employees of the corporation who are employed here in Seattle?

A. No, he didn't.

Q. Did you have a discussion at that time, Mr. Monfore, as to whether or not there were any standards or tolerances established by the Pure Food and Drug Administration [66] relative to the presence or absence of insect fragments in macaroni products? A. Any tolerances?

Q. Yes.

A. I don't recall that any discussion was had with reference to tolerances for filth in macaroni products.

Q. You understand the situation, you know Mr. Larrick do you not? A. George Larrick?

Q. Yes. A. Yes, I do.

Q. Who is he?

A. He is one of our head officials in Washington, D. C.

Q. He establishes, does he not, matters of policy and passes upon matters of policy of the Pure Food and Drug Administration?

A. He is in the policy-making department. He is not the Commissioner of Food and Drug.

Q. I understand that he is in the policy-making department? A. That is correct.

Q. In charge of the inspections and supervision divisions, is he not? A. No, he isn't.

Q. And did not Mr. Dedomenico at that time advise [67] you that he had been advised by Mr. Larrick that a tolerance policy of twenty-five per

(Testimony of Kenneth E. Monfore.)

cent (25%) insect fragments per sample would be acceptable? Were you not informed of that?

A. No, I wasn't.

Q. At the time of this hearing?

A. No, I wasn't.

Q. Did you, at the time of this hearing, Mr. Monfore, note results of the analyses which had been made by your chemists?

A. On the samples involved in this case?

Q. Yes. A. Yes.

Q. And none of those samples contained in excess of twenty-five per cent (25%) insect fragments per sample?

A. I don't recall the figures at the present time. I wouldn't say one way or the other.

Q. Did you, yourself, at that time or as a part of a conference or hearing make an inspection of the plant of the Golden Grain Macaroni Company?

A. No, sir.

Q. You were invited to come down and make an inspection, were you not?

A. I believe Mr. Dedomenico at various times has invited me to come down.

Q. May we have at this time, Mr. Monfore, the minutes [68] of the hearing that you prepared?

A. What I have is my file copy of the record of that hearing which I dictated in their presence.

Q. Was a copy of that given to Mr. Dedomenico?

A. No, it wasn't, I don't believe. Sometimes they are.

* * *

(Testimony of Kenneth E. Monfore.)

Mr. Sager: I will offer it as an exhibit, sir.

The Clerk: Plaintiff's Exhibit 8 for identification. [69]

* * *

The Court: Let it be received and marked.

(Plaintiff's Exhibit No. 8 marked for identification and admitted in evidence without objection.)

* * *

Q. Mr. Monfore, these are simply your extracts and resume, are they not, of the conference which you had on that date in February of 1952?

A. That is the verbatim statement which I dictated in their presence as to my understanding of their responses.

Q. It is your understanding of their response, is that what you are getting at?

A. Yes, which I dictated.

Q. And it does not, or does it, purport to contain in there everything that they stated to you?

A. Not in their words, no sir.

Q. Did they—excuse me, strike that. This Exhibit 8 then purporting to be a record of the hearing does not contain any statements that either you or Mr. Lofsvold made to Mr. Dedomenico or Mr. McDiarmid? [70]

A. Any statement which we made?

Q. Yes.

A. No, there might possibly be references to our comments to them in there. That record is supposed

(Testimony of Kenneth E. Monfore.)

to be, and the hearing officer tries to have it, as an understanding of their response to the notice of hearing.

* * *

Redirect Examination

By Mr. Sager:

Q. Mr. Monfore, you say this was dictated in their presence? A. That is correct.

Q. Now then, your last paragraph says, "I asked Mr. Dedomenico and Mr. McDiarmid if the preceding record of hearing as I had dictated it represented a true report of the hearing and they agreed that it did." Was that—did that occur as you stated there, at the end of dictating it to your stenographer?

A. That is part of the dictation, yes, sir. [71]

* * *

LAURA SHOOP

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name. A. Laura Shoop.

Q. Where do you live Mrs. Shoop?

A. 4417-4th Avenue South.

Q In Seattle? A. Seattle.

Q. Were you at one time employed by the Golden Grain Macaroni Company?

(Testimony of Laura Shoop.)

A. Yes, sir.

Q. During what period of time?

A. Seven years and a half (7½ yrs.) I worked for Mr. Dedomenico.

Q. During what time? When was that?

A. When I started it was May, 1945, until just July this year I retired.

Q. And what sort of work did you do there?

A. Principally cutting and packing spaghetti, bulk packing, cellophane packing.

Q. And where in the factory was that work done? A. What is it? [72]

Q. What part of the factory is that work done?

A. That is in the upper story.

Q. Upper what?

A. Upstairs, manufacturing room.

Q. On the top floor? A. Yes.

Q. What else is done on that floor?

A. Well, a little bit of everything, I guess you might say.

Q. Can you tell what machinery is up there?

A. First they make the noodles up there. They have the automatic machinery, you know, and they make noodles, elbow spaghetti, elbow macaroni, various.

Q. Is that actually the manufacturing part of this plant, that is, on this same floor?

A. Yes, sir.

Q. During the time you worked there did you have occasion to notice the conditions with respect to insects? [73]

* * *

(Testimony of Laura Shoop.)

Q. Well, was there any change in the conditions as you observed them during the period of your employment?

A. Well, I think they became a little better. We got to handle it a little different than it was when I first started there; the conditions were cleaner.

Q. Well, can you state what the conditions were during July, June and July of 1951, a year ago?

A. Well, dirt, bugs.

Q. What kind of bugs?

A. Millers, you know, deposit their eggs around different places in the plant.

Q. Did you observe those in the plant?

A. Oh, yes.

Q. Where did you see them?

A. Well, in the dryers, in the tunnels where those——

Q. What do you mean by tunnels?

A. That is where they put their noodles, the trays of noodles in for drying, that is what I call it, tunnels.

Q. I see.

A. And, of course, we found them in the spaghetti dryers, too, quite often. [74]

Q. What sort of a thing is a spaghetti dryer?

A. Well, it is a large room where they have a fan on where they dry with the hot and cold air.

Q. And how is the spaghetti put in there?

A. Like on cars.

Q. I mean, what is it on while it is in the process of drying?

(Testimony of Laura Shoop.)

A. Well, I suppose you would call it hot and cold air. There is a fan in there which they use to circulate the air through it.

Q. But I haven't made my question clear to you, Mrs. Shoop. What sort of a container is the spaghetti in while it is in this room, while it is in the process of being dried? A. They are on cars.

Q. You mean—— A. Three (3) tiers.

Q. Of what?

A. Of the length of the spaghetti. You know, the long spaghetti. Three (3) tiers on cars. Some of the dryers would hold fifteen (15) cars and the others would be twelve (12).

Q. You call them cars?

A. I do. I guess the boys call them maybe trucks. I don't know, but I called them cars when I was working with [75] them.

Q. Is the spaghetti on a car?

A. Yes, drying that way.

Q. Do they hang on—what is it?

A. On sticks, on sticks, the spaghetti is on sticks.

Q. That is what I was trying——

A. Perhaps you wouldn't know if you never seen it done. I don't suppose it would be very——

Q. I am trying to get you——

A. "Experience is the best teacher," they say. You can learn how by experience.

Q. Are any of the products they make there dried in trays? A. Oh, yes.

Q. What sort of trays are they?

(Testimony of Laura Shoop.)

A. Well, the noodles and the elbow spaghetti.

Q. And in what sort? A. Various types.

Q. What sort of tray is used in the drying of that product?

A. Well, I don't know the size of them, but then they are on a wire, lay on a wire——

Q. Screen? A. Screen.

Q. Did you ever observe them with respect to their [76] cleanliness? A. Yes.

Q. What did you observe about them?

A. A great many times they weren't too clean.

Q. Well, what did you observe specifically?

A. Insects.

Q. What type of insects?

A. Moth and millers.

Q. What was done in the plant or on this particular floor with respect to controlling these moths, cleaning it up? A. I beg pardon.

Q. What was done in the way of attempting to control these moths or insects that you observed?

A. Well, they used a spray a great deal in the dryers, but I don't think that is a very thorough method for getting rid of them.

Q. Were they still there after the spraying?

A. Yes, I think so, that is, the moth may have —they may have exterminated him, but I don't think they ever got those little worms down around the edges, you know, the trays and where they put those trays in there, I don't think they were ever thoroughly cleaned. That is one objection——

(Testimony of Laura Shoop.)

The Court: You don't think or do, you [77] know.

The Witness: I know because we seen them.

Q. Who did the cleaning up around the place?

A. Well, just most anyone of us that was available, I guess.

Q. Did you ever do any of the cleaning?

A. Not in that particular part of the work, I didn't.

Q. Well, was there anybody especially assigned to clean?

A. No not—only for a short time.

* * *

Cross-Examination

By Mr. Yothers:

Q. Mrs. Shoop, didn't you receive instructions that you were to keep the place clean while you were working there?

A. Yes, we have those instructions, but who could keep the place clean when they had to do something else all the time?

Q. That was part of your duties, wasn't it?

A. That is what they say, but you can't do two (2) or three (3) jobs at once.

Q. Is that one of the reasons why you were discharged?

A. You have got to clean those tunnels. You have got to get down into them. [78]

Q. Is that one of the reasons why you were discharged? A. I wasn't discharged.

(Testimony of Laura Shoop.)

Q. Is that one of the reasons you quit was because you couldn't keep the place clean?

A. No, I retired. It was not the work. Just got a little too heavy for me.

Q. Outside of these moths that you said—by the way, in June and July of 1951, how many of these moths did you see?

A. Oh, I never tried to count them.

Q. Saw a lot of them, is that right?

A. Yes, a big lot of them.

Q. Thousands of them?

A. You could find them plenty.

Q. Well, were there a lot of them?

A. Yes, sir.

Q. Would you say they were crawling all over the place?

A. Oh, I wouldn't make it that bad, no. There is plenty of them there.

Q. Just how bad was it? Was it just——

A. Nearly everything you turned over you could find some of them.

Q. Did you do that, did you turn them over?

A. I was busy doing other things.

Q. What would you do when you found a [79] moth?

A. We'd kill them.

Q. Did you report the presence of moths?

A. Oh, yes, every once in a while.

Q. Who would you tell?

A. Told Mr. Mulvaney about them once in a while.

Q. Beg pardon?

(Testimony of Laura Shoop.)

A. We'd tell Mr. Mulvaney about it.

Q. You were supposed to tell him about it all the time. What did Mr. Mulvaney do?

A. Well, he is our foreman.

Q. What would he do?

A. He wouldn't do anything as a rule.

Q. He wouldn't? A. No.

Q. Just let it go?

A. Yes. They sprayed. I will say that they sprayed, but that spray doesn't get them. It don't get them.

Q. Have you ever been in any other spaghetti or macaroni plants? A. No, never have.

Q. Well, outside of the moths that you saw, was there anything else that you observed, any other insects? A. No, sir.

Q. That is the only thing?

A. That is the only thing. [80]

Q. Would you say that—you said that the condition was getting a little better. Would you say it was better there in June and July of 1951?

A. Well, I don't—I can't recall it so definitely as all that, but then of course, we made an effort all the time to try to keep them down.

Q. Were you provided with uniforms to work in? A. Yes, sir.

Q. Who provided you with those?

A. Mr. Dedomenico.

Q. They were kept clean weren't they?

A. They were washed once a week, laundered.

(Testimony of Laura Shoop.)

Q. And you were instructed to keep your hands clean? A. Yes, we were.

Q. And not comb your hair out there in the plant or anything like that?

A. We wore nets to keep our hair secure.

Q. Well, Mrs. Shoop, you say you worked there for seven (7) years. Would you say at that time in June and July of 1951 that the plant was unsanitary? A. Oh, yes.

Q. You would say it was unsanitary?

A. Yes.

Q. Why would you say it was unsanitary?

A. Because they weren't as clean as they should have [81] been all the time.

Q. And you base that upon the fact you saw moths there? A. Yes, sir.

Q. Did you at any time during the seven (7) years observe any procedures or methods that he used that would dispose of these moths that you saw?

A. I was telling you, they used a spray. I don't know what it was or what, but they have been using a spray.

Q. Outside of the moths, was the place sanitary?

A. What do you mean by sanitary? It isn't as clean as I'd like to see it kept.

Q. I see.

A. We had lots of grievances as far as cleanliness was concerned, a lot of us.

Q. What instructions did you receive from Mr. Dedomenico or Mr. Mulvaney, either one, as to the

(Testimony of Laura Shoop.)

procedure you should follow if you found a moth?

A. Oh, just kill them. What else can I do?

Q. You weren't instructed to put them into a cellophane bag? A. No.

Q. You didn't get any such instruction at all?

A. No, no.

Q. Did you ever do that?

A. I didn't, no I never did. Fact of the [82] matter, I never handled that sort of product. I never did find anything in the kind of product I handled at all. I never did find them at all, but as I say, it seemed to be more in the smaller stuff, noodles and the girls downstairs handled that. I didn't have anything to do with the handling of that.

Q. Oh, I see.

A. No, occasionally they would put me down there for extra help to help out, but that is all the time I ever did work on the noodles.

Q. You were working down there in June and July of 1951, were you? A. Yes.

Q. Downstairs?

A. Oh, not downstairs, not particularly, no. I say it was just occasionally that they put me down there. I worked mostly upstairs. That is where I worked all the time.

Q. And when you worked upstairs you didn't see these things, is that it?

A. Oh, yes, they were all over, but as I say, they didn't infest the long spaghetti. They did the small stuff. I did bulk packing and I never found any-

(Testimony of Laura Shoop.)

thing like that in the bulk packing, the large twenty pound (20 lb.) stuff.

Q. Did you at any time in June or July of 1951 ever observe any of these moths or any insect fragments in the [83] packages that you were packaging?

A. No, I never had them in what I did, no.

Q. Never anything that——

A. Not in what I did upstairs, cellophane pack.

* * *

The Court: I have a question I'd like to ask you. You volunteered the statement that you had your grievances. What did you mean by that?

The Witness: Well, we just couldn't keep things clean as we would like to. We had our work to do. We were assigned to a certain piece of work and we'd hurry to get that through in our day's work and we couldn't stop that and run and sweep floors and keep the house clean also. I couldn't see where they could tack that onto us.

The Court: Did you ever have any grievances against any of your employers down there?

The Witness: No, sir.

The Court: And when you left the employ of the company did you leave on a friendly basis?

The Witness: Yes, sir. I bid Mr. Dedomenico good-bye. He was very nice. He said if I wanted to come back, to come back, and I thought he was very nice.

The Court: Any prejudice or illwill against [84] these people by whom you were employed?

(Testimony of Laura Shoop.)

The Witness: No, sir. I liked to work there and enjoyed it very much, but I do think that——

The Court: I am not interested in what you think. I am interested in what you know.

The Witness: I know they could be differently handled down there.

* * *

Redirect Examination

By Mr. Sager:

Q. Mrs. Shoop, you said that you spoke to Mr. Mulvaney about finding moths. Did you ever say anything to Mr. Dedomenico about it?

A. Oh, he knows it was all over the place. One time I spoke to Joe about it, Mr. Mulvaney was wheeling out the spaghetti. We had to push those big cars of spaghetti out and my part was to cut them up and pack them, you know. Well, that one special day I pushed one car out and it was just full of those flies there, those moths, I guess you'd call them. I don't know what the name of the things is, and I spoke to Joe about it. I said the dryer should be cleaned out. Well, of course, they are all busy with their ordinary work. [85]

Q. Was it cleaned out on that occasion?

A. No. They are usually full, the dryers are usually full and it takes time to do all that.

Q. Was Mr. Dedomenico around in the manufacturing area?

A. Oh, yes; off and on. I didn't see very much of him.

* * *

(Testimony of Laura Shoop.)

Recross-Examination

By Mr. Yothers:

Q. On this particular occasion you refer to, was that in July of 1951? A. Is what?

Q. When was this particular occasion that you just referred to?

A. About the millers on the cars, that was just a while before I quit work up there.

Q. In 1952? A. Yes.

Mr. Yothers: I move the answer be stricken, your Honor. It is not the time, and furthermore, it is not responsive.

The Court: Let it stay in.

Q. Mrs. Shoop, did you discuss your testimony with anyone? [86]

A. Well, I was interviewed yesterday.

Q. By whom? A. This gentleman here.

Q. Mr. Sager?

A. Well, I don't know this man. At the present time I don't know their names.

Q. Did you discuss your testimony with anyone else at any other time? A. No.

Q. Never saw anyone else before? A. No.

Q. Never saw Mr. Monfore?

A. He was in the room yesterday with this gentleman. [87]

* * *

FRED SHALLIT

being first duly sworn on oath, was called as a witness on behalf of the plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. Your name, sir? A. Fred Shallit.

Q. Where do you reside?

A. 6019 - 38th Avenue N.E., Seattle.

Q. And your occupation?

A. I am inspector with the Food and Drug Administration, Seattle, Washington.

Q. How long have you been in that position?

A. Approximately four and one-half years (4½ years).

Q. Mr. Shallit, did you take some samples from some of the shipments involved in this proceeding?

A. Yes, I did.

Q. Which ones were they?

A. On 7/16/51 I visited the West Coast Fast Freight and I obtained two samples of macaroni products.

Q. At that time did you see the bill of lading or shipping documents?

A. Yes, sir; I did.

Q. Concerning that shipment?

A. Yes. [88]

Q. And the shipment was destined to where?

A. To General Grocery, Eugene, Oregon.

Q. Showing you Plaintiff's Exhibit 3, did you see that bill of lading at that time?

(Testimony of Fred Shallit.)

A. Yes, I did.

Q. And the product described in it, that is the one that you sampled? A. Yes, sir.

Q. What generally did the shipment consist of?

A. There were eight (8) cases of twenty pounds (20 lbs.) each of bulk elbow macaroni, and there were two (2) cases of twenty pounds (20 lbs.) each bulk spaghetti.

Q. And what sort of sample did you take of those two?

A. From the eight (8) cases of twenty pounds (20 lbs.) each, I took approximately two and a half pounds (2½ lbs.) from each of these eight (8) different cases. I—later on I put collection number 28—excuse me, collection number 29-871 L on this sample. On a sample which I later identified as 29-872 L, which consisted of two (2) twenty-pound (20 lbs.) bulk shipping cases, I took approximately three pounds (3 lbs.) from each of the two (2) shipping cases.

Q. You say this was in—was that the same product, elbow macaroni, this——

A. 29-871 L is elbow macaroni and 29-872 L is spaghetti. [89]

Q. How are they packed?

A. These were packed in bulk. They were in cardboard cases and inside the cardboard case after I opened it up was an additional wax paper liner.

Q. And then the product was in bulk in there?

A. Yes, sir.

(Testimony of Fred Shallit.)

Q. What did you do with the samples after you took them from the shipping cases?

A. I took the samples, each sample from the shipping case. I placed each sub, as we designate it, into a clean kraft paper bag. I closed the bag firmly by rolling the top. Placed some of it in an original shipping case which I had, and the others I carried in my arms to my car, which I then took to the Food and Drug office in Seattle, where I work, and then eventually placed these products under my seal which I subsequently submitted to the United States Food and Drug Administration laboratory in Seattle.

Q. And did you—how did you designate them; how did you indicate the sample numbers on the sealed cases that you turned in to the laboratory?

A. On the seal itself, 29-871 L. I put a seal on which stated "29-871 L, 7/16/51," and signed my name, "Fred Shallit." Likewise on 29-872 L I put a similar seal identified "29-872 L, 7/16/51," with my signature, "Fred Shallit."

Q. Now, Mr. Shallit, did you have occasion to make [90] an inspection of the Golden Grain Macaroni Company factory? A. Yes, sir.

Q. And did you make that with anyone else?

A. Yes, sir; on July 18th and 19th, 1951, in company with Inspector Horace A. Allen of our Administration, I made an inspection of the Golden Grain Macaroni Company in Seattle, Washington.

Q. Where is that plant located?

(Testimony of Fred Shallit.)

A. It is, I believe it is about 4700 and Sixth Avenue South.

Q. Generally, what is the plant? Can you describe it to us?

A. It is a two (2) story building with a basement. It is a solid concrete structure. It is a very spacious building with a good deal of light, and a lot of windows. I would say hardwood floors or wood floors for the most part, either wood partitions or concrete or plaster walls throughout.

Q. Now on this occasion when you went there, what time of day did you go there?

A. I arrived at the plant with Inspector Allen on July 16th at approximately eight a.m. (8:00 a.m.).

Q. And what part of the plant did you go?

A. I entered through the main door and went directly into the office, which leads up from some steps from the [91] main door.

Q. And what did you do there?

A. There was a girl in the office. I identified myself as an inspector and showed her my credentials. I asked if Mr. Paskey Dedomenico was in. She said no, he wasn't in; that he was down south. I believe she said California, that he had been gone for approximately two (2) weeks and would be back shortly, within a week or so. I then requested permission to make an inspection. She said that Mr. McDiarmid was in charge of the plant, but that he wasn't in, either, but was expected down very shortly. I asked then who might grant me

(Testimony of Fred Shallit.)

permission to make the inspection. She said she would inquire from Mr. Joe Mulvaney. We waited downstairs and she reappeared a few moments later and told us that Mr. Mulvaney didn't feel that he had authority to grant us permission to make the inspection. She said, though, that Mr. McDiarmid would be down shortly. We thanked her and told her we would return within about a half (½) hour, which we did. We left the plant and returned approximately a half (½) hour later.

We entered the plant again the same way. This time she said that Mr. McDiarmid had not arrived yet, but would we kindly wait in a rear office. We went to that office, and within five (5) minutes after the second visit Mr. McDiarmid did appear. [92]

We introduced ourselves again. He seemed to know us. He shook hands with each of us, very friendly. We stated we would like to make a factory inspection. He said, "Go right ahead, boys." I believe those were his words, and he also said that if we needed any help, too, for us to let him know.

Then we went back to our car right after that to obtain our clothing. We ordinarily wear—in this case I wore white coveralls which I had in the car. I also had some other equipment. I returned to my car, and then I went upstairs in the men's dressing room and changed into my white coveralls. From there—I was with Inspector Allen all this time, of course. Then from there I proceeded

(Testimony of Fred Shallit.)

into the plant proper on the second floor and I began my inspection.

* * *

Q. Showing you Plaintiff's Exhibit 9 for identification, Mr. Shallit, what is that exhibit?

A. This for the most part is a sketch, a general sketch of the layout of the top floor of the Golden Grain Macaroni Company at the time of my inspection on 7/18/51.

Q. Was that prepared under your direction?

A. Yes, sir. [93]

Mr. Yothers: If it please the Court, at this time I propose an objection to the witness testifying any further as to the results of his examination or as to any of the samples that he took or as to any of the exhibits he prepared as the result of the examination and inspection that they conducted on the date and time and place indicated. The objection is based upon the statute itself and upon two (2) cases, your Honor. [94]

* * *

The Court: You say McDiarmid was the sales manager?

Mr. Yothers: Yes, sir.

The Court: Wasn't he the ranking man in charge of the plant?

Mr. Yothers: He was the ranking man. He was not in charge of the plant, your Honor. There is no testimony that he was. [111]

* * *

(Testimony of Fred Shallit.)

The Court: What is McDiarmid's official [112] position with the company?

Mr. Yothers: He is the sales manager, your Honor. Mr. Mulvaney is foreman in production.

The Court: I am prepared to rule. I hold Mr. McDiarmid was the custodian and the permission was properly granted and the inspectors were within their rights. The objection will be overruled. Proceed.

* * *

Q. I think, Mr. Shallit, you had just testified that Plaintiff's Identification 9 was a sketch or plan of the top floor made under your supervision.

A. That is an approximate plan; yes, sir.

Mr. Sager: We will offer the exhibit.

Mr. Yothers: Is this drawn to scale, Mr. Shallit?

The Witness: That is only an approximate sketch.

Mr. Yothers: Roughly, what is the scale used?

The Witness: The building itself is approximately ninety-five feet (95 ft.) by a hundred and five feet (105 ft.) and, as I say, that would [113] be your approximate size for your other dimensions.

Mr. Yothers: Subject to the objection noted as to the testimony of the witness, your Honor, relative to receiving permission, we have no objection to this.

The Court: Very well.

(Plaintiff's Exhibit No. 9 marked for identification and admitted in evidence.)

(Testimony of Fred Shallit.)

Q. Mr. Shallit, Exhibit No. 9 represents a top floor. What part of the operations of this factory are carried on on the top floor?

A. In the southwest area is what I would term the principal part of the flour conveying system. It is to handle flour which eventually will be taken toward the east into the main manufacturing area.

In the extreme east or upper right-hand corner are two (2)——

Q. Let me interrupt. Where is north? North is the top?

A. North is to my left, south is to my right, and east and west (indicating).

Q. Okey, now go ahead.

A. I might further add, in this area—this is a five-foot (5 ft.), approximately five-foot (5 ft.) elevated platform—there is a wall that, as you see, does not go entirely through [114] the building, but does extend to the ceiling that separates the partial west end from the partial east end.

On this platform is conducted the noodle manufacturing part of the operations. The alimentary paste then is dried both on continuous drying machines, which are represented by these two (2) oblongs, and in various drying rooms in the east and the west section of the top floor (indicating).

Also in the vicinity of the flour conveying system is a macaroni grinder, which I have been told is used to grind alimentary paste.

Q. That is indicated there on the platform?

A. Yes, sir; by this little oblong.

(Testimony of Fred Shallit.)

Q. Now, Mr. Shallit, what did you—first, what part of the plant or operating machinery did you first inspect in the course of this inspection?

A. I began my inspection in the southwest section of the main plant, which is the lower right-hand area of this drawing, and I began an inspection of what I term the flour conveying system or the flour handling system.

If I might go into a little more detail as to what this consists of?

Q. All right.

A. It consists first of a hopper into which flour is dumped. Then there is a screw conveyor directly to the [115] east of that hopper and actually a part of it which conveys the flour from the hopper to an elevator.

Now this elevator actually comes up in the air. That elevator then will take the flour through, up to another screw conveyor upon which is a coarse sifter, and then by means of an overhead screw conveyor dumps this flour into the flour storage bin.

Now, this bin is approximately eight feet (8 ft.) high and maybe six feet (6 ft.) long and perhaps four or five feet (4 ft. or 5 ft.) wide, the purpose of which is to store the flour.

Q. That is the process from the original sacks until the flour is emptied into the bin?

A. That is right. In other words, it goes from the hopper eventually into this large flour storage bin.

Now, to convey the flour from the storage bin to

(Testimony of Fred Shallit.)

the manufacturing area which is towards the east, there is also another bucket elevator which carries the flour up practically to the ceiling, where there is an overhead conveyor. This overhead conveyor then conveys by a screw arrangement to what is known as a scale hopper and, as I understand, that scale hopper weighs out set amounts of the flour or semolina which may be used in the manufacturing process.

Q. You mention semolina. What is [116] semolina?

A. Well, semolina actually is a coarser material. It is of yellowish appearance. It is, I believe, called the heart or endosperm of a particular type of wheat.

Q. Well, is it a wheat product?

A. Yes, sir.

Q. Used in the manufacture of what?

A. Of alimentary paste for macaroni and spaghetti.

Q. You will have to tell what alimentary paste is.

A. I refer to alimentary paste as macaroni, spaghetti and noodle products or similar such products.

Q. Have you completed your general outline of that conveyor system?

A. Yes, sir; I think I have.

Q. Now, what part of that did you first examine?

A. I began my examination of this hopper,

(Testimony of Fred Shallit.)

which has a wooden cover on it. For purposes of illustration I requested the person who drew this to make these lines to indicate the cover of the hopper. Now, on this cover I noted one dead moth.

I next examined the hopper, which just prior to my inspection was having semolina dumped into it, but upon my request of Mr. Mulvaney he very courteously allowed me to make my inspection and stopped his operations in order that he might assist me.

Q. Well, now, was this flour conveying system in [117] operation when you started your inspection?

A. The hopper part of it was in operation.

Q. Was the plant generally in operation at the time?

A. There was some operation. Whether this part was in operation, I could not say.

Q. What part are you referring to?

A. The overhead conveyor system and scale hopper, that is. Whether or not flour was being taken from the main storage flour bin, I could not tell in the short time I had begun my inspection. However, I did observe that there were manufacturing operations by the five-foot (5 ft.) conveyor—by the five-foot (5 ft.) elevated platform later on in my inspection.

Q. All right.

A. The operations of dumping the flour, the semolina into the hopper, were terminated while

(Testimony of Fred Shallit.)

we began our inspection, and I was with Inspector Allen all this time, although I may say "I."

Inside this hopper I saw two (2) live moths directly in the flour. I also saw insect webbing and live larvae inside of this flour that was in the hopper. I next——

Q. What is insect webbing?

A. This insect webbing is the material which the larvae spins or gives off in its life's cycle.

Q. All right. [118]

A. My next inspection was of the approximately five-foot (5 ft.) screw conveyor which is attached to this hopper and practically on the ground floor. Now, covering this five-foot (5 ft.) screw conveyor is a wood housing, the top of which was very readily removed. I removed the wood plates which were on this screw conveyor and began an examination of the contents of it.

In the south section of the screw conveyor inside with the flour, I counted eleven (11) live moths. I counted four (4) live moths in the north end of this conveyor. I estimated by a partial count that there were approximately fifty (50) pupa surrounding the screw conveyor and inside the housing.

I also noted live larvae and insect webbing both on the housing and in contact with the flour in the screw conveyor.

Q. Did you take pictures while you were making this inspection?

A. I didn't take pictures, sir. I observed Inspector Allen take pictures.

(Testimony of Fred Shallit.)

Q. Was a picture taken of this conveyor?

A. Yes, sir.

Q. Showing you Plaintiff's Identification 11, is that a picture of—taken at that time?

A. This is a picture of the five-foot (5 ft.) [119] screw conveyor with the wooden covers removed by myself.

Q. And what is above, just above that conveyor there?

A. The hopper which I referred to with its wooden cover attached can be seen directly above this screw conveyor.

Q. From the position from which the picture was taken you are looking at the back of the hopper?

A. Yes, sir; this picture would be taken with Inspector Allen standing here and photographing towards the west (indicating).

Q. That photograph is a fair and accurate representation of what you saw at that time?

A. Yes.

Q. Of what it purports to show?

A. Yes, sir.

Mr. Sager: We will offer the exhibit.

* * *

Mr. Yothers: I haven't seen it. (Whereupon, he examined proposed Exhibit 11.) Subject to the objection noted as to the testimony of this witness, your Honor, I have no objection to it.

The Court: Very well; let it be received.

(Plaintiff's Exhibit No. 11 marked for identification and admitted in evidence.)

(Testimony of Fred Shallit.)

Q. All right. Where did you go from there, then, [120] Mr. Shallit?

A. I next examined the elevator which conveys the flour from the screw conveyor up in a horizontal position.

Now, there is also housing on this elevator, the front of which was readily removed. By taking off that housing I was able to count fifteen (15) live moths in the general area in the housing among the buckets and also I observed insect webbing and live larvae.

Q. Showing you Plaintiff's Identification 12, is that a photograph that was taken at that time?

A. Yes, sir.

Q. And that shows this elevator you are speaking about? A. Yes, sir.

Q. Is it a fair and accurate representation of it?

A. Yes, sir.

Mr. Sager: I will offer that exhibit.

Mr. Yothers: Subject to the same objection, your Honor, as to the testimony of this witness, we have no objection to the photograph.

The Court: Let it be received.

(Plaintiff's Exhibit No. 12 marked for identification and admitted in evidence.)

Q. What sort of elevators were these?

A. These would be called bucket conveyors.

Q. I show you Plaintiff's Identification 13. [121] Is that a picture of one of them?

A. Well, I believe that is the upside of it, sir,

(Testimony of Fred Shallit.)

in that that would be the east section of this elevator as it goes around the corner.

Q. Well, is that a part——

A. Part of the elevator, sir, but this section here—I was talking about this panel being removed and looking into that area.

Q. This is the down part?

A. That is the down side.

Q. In other words, the buckets go up on this side and down here (indicating)? A. Right.

Q. The picture there is taken from this section going up? A. Going up.

Q. All right. That illustrates the type of carrier it is, elevator? A. Yes, sir.

Mr. Sager: We will offer that exhibit. That is No. 13.

* * *

Mr. Yothers: One question relative to Exhibit 13. Does this indicate the condition of the scoop in the elevator, this photograph? [122]

The Witness: This photograph, sir, you would like me to say what I observed, what I observed?

Mr. Yothers: What does the photograph represent?

The Witness: This photograph represents two (2) live moths that I observed among the other live moths which may be seen here in the inside housing of the elevator.

Mr. Yothers: Those two (2) live moths are the two (2) dark approximately quarter-inch (¼″)

(Testimony of Fred Shallit.)

long objects on the right-hand corner of the housing; is that it?

The Witness: I think they'd be one-half to three-quarters of an inch (½" to ¾"); yes, sir.

Mr. Yothers: Subject to the same objection, your Honor, we have no objection to that.

The Court: It will be received.

(Plaintiff's Exhibit No. 13 marked for identification and admitted in evidence.)

Q. All right. Continue with what you——

A. I next examined on this same bucket elevator the boot section of it. Now, the boot I refer to is the very bottom part of the elevator and there is what we call a sliding port door which can be raised to expose what is [123] the dormant stock in the elevator.

Now, I observed Inspector Allen working with him, take out approximately ten pounds (10 lbs.) of this static stock and put it through a twenty (20) mesh screen. We then took the material which remained in the twenty (20) mesh screen and which was insect webbing with larvae in it, and we took that as a sample.

Q. That was taken from what you call the boot or the bottom of this elevator?

A. Right, sir.

Q. All right. What did you do next?

A. I next removed the head of this elevator, which cannot be seen in this picture in that it comes out to a distance of approximately twelve

(Testimony of Fred Shallit.)

feet (12 ft.), and upon removing the head I observed approximately fifteen (15) live moths and larvae and insect webbing in this head.

Q. Was there a picture taken of that?

A. I don't believe so, sir.

I then began an examination of the east end of this same bucket elevator in the same manner as I examined the west end by removing the front paneling and observed, after the front paneling was removed, that there were, I counted sixteen (16) live moths, insect webbing and larvae, and that completed my inspection of the elevator proper.

Q. All right, where did you go from [124] there?

A. I then continued my inspection of the flour handling equipment and I inspected—I might explain just a little bit as far as this overhead conveyor is concerned, which leads from the elevator that I have just been talking about.

There is a short screw conveyor between the elevator head and the coarse sifter. This is also housed in a wooden structure approximately ten or twelve inches (10″ or 12″) square.

Q. Is that shown in this picture, Plaintiff's Exhibit 12?

A. Yes, sir; it would be. Between the conveyor system and the coarse sifter is the area which is also a screw conveyor which I am referring to.

Q. Is that that short horizontal portion there that you are pointing at? A. Yes, sir.

Q. All right. What did you find there?

(Testimony of Fred Shallit.)

A. I removed the plate cover from this section of the conveyor and I found two (2) live moths adhering to the cover. There was also adhering to the cover nine (9) larvae and insect webbing.

I noted directly in the screw conveyor in contact with the flour one (1) live moth and insect webbing.

Q. Did you take a picture of that? [125]

A. I didn't take any pictures, sir, but I saw Inspector Allen take a picture of that.

Q. And plaintiff's Exhibit 14 for identification, is that a picture taken of that cover that you say you removed?

A. Yes, sir, this picture was taken standing in the south section on top of this flour storage bin looking towards the north.

Q. Is that a fair representation of what you saw?

A. Yes, sir, it shows the live moths which I observed. It is difficult to distinguish the webbing. It shows what appears to be larvae which I observed and which I counted and found that there were nine (9).

Mr. Sager: We will offer Exhibit 14.

Q. All right, from there where did you go?

A. I then examined the coarse sifter. If I may explain generally the purpose of a coarse sifter. It is to remove the coarser materials like paper or string that might fall into the conveyor system, and in order that it may not be incorporated with the product, there is a throwout area in this sifter which will throw out that material.

(Testimony of Fred Shallit.)

Q. Is that sifter shown in any of these pictures that are here?

A. This is the sifter, sir (indicating a picture).

Q. Oh, I see. [126]

A. There is an end plate which cannot be seen in this picture which can be removed, can be lifted up. And I lifted up that end plate with Inspector Allen and I saw insect webbing and larvae in the throwout of that sifter.

Q. All right.

A. I next made an examination of the main flour storage bin. Now, it is not shown in this diagram I see, but in the area at which I am pointing, which is towards the east side of the flour storage bin, is a small trapdoor approximately two or two and one-half feet (2 ft. or 2½ ft.) square. I opened that trapdoor and with the aid of a flashlight——

Q. Is that trapdoor in the storage bin?

A. That is.

Q. It opens into the storage bin?

A. No, it opens out from the storage bin.

Q. Do you have a picture of that storage bin?

A. We have it, but it is hidden by the overhead system.

Q. But does the storage bin show in that picture?

A. Excuse me, the storage bin is this large rectangular object.

Q. What exhibit is that you are referring to now? A. I am referring to Exhibit 12.

Q. All right, go ahead. [127]

(Testimony of Fred Shallit.)

A. I looked into the flour storage bin through the trapdoor and I counted six (6) moths flying inside the flour storage bin. I also noted directly in contact with the flour I was able to count with my flashlight fifteen (15) other moths which by their position appeared to me to be alive.

Q. They were in the flour?

A. They were directly resting on the flour itself. I might further explain, the flour storage bin was almost empty. There was some flour on the bottom and in a screw conveyor which also rests on the bottom of this flour storage bin, and the flour, most of it, was piled up in the south area of the flour storage bin. I noted my moths in the south area, those that were resting on the flour.

Q. All right. Where did you next go?

A. I obtained a ladder in the plant and I descended into the flour storage bin in order to make a more complete examination of my visual observations with a flashlight, and while in this flour storage bin I saw insect webbing in the bin adhering particularly to the top or the inside roof.

I also obtained samples of the flour and I obtained some insect filth samples. That completed my inspection of the flour storage bin after which I ascended the ladder and continued with my inspection. [128]

Q. Where did you go from there?

A. Just before I began a further examination of the flour conveying system, I noted that on a wall which is directly to the east of the flour storage bin

(Testimony of Fred Shallit.)

and is within a few feet of the main flour storage bin in an area of approximately twenty-five to thirty-five square feet (25 sq. ft. to 35 sq. ft.), that there was a mass of pupae. I made an estimate with a partial count that there were probably approximately four hundred (400) pupae.

Q. What do you mean; what are the pupae?

A. Pupa is part, is one of the life cycles through which the Mediterranean flour moth goes through just prior to the moth emerging. If I may explain a little farther, the eggs are laid. From the eggs are hatched the larvae or worms. The larvae or worms spin a cocoon or a pupate, as it is more commonly known, and eventually from the pupa the moth emerges.

Q. Well then, pupa is, as you use it, is synonymous with cocoon?

A. It is used synonymously by many people, sir.

Q. What I am trying to get at, these four hundred (400) pupae you say you estimated on the wall, were that many cocoons there?

A. They could be referred to as cocoons, yes, sir.

Q. Was a picture taken of that? [129]

A. Yes, sir.

Q. Plaintiff's Exhibit 15 for identification, is that a picture? A. Yes, sir.

Q. Is that a fair representation of what you saw?

A. In this picture it is very difficult to see what we saw much more clearly than that when I was

(Testimony of Fred Shallit.)

with Inspector Allen the area to manipulate the camera is very close and this material does not show up as well as it did to my observation.

Q. It is observable on the wall?

A. Yes, sir.

Mr. Sager: We will offer the exhibit. Apparently no ruling yet on Exhibit 14, your Honor.

The Court: It will be received subject to the same reservation counsel has made.

(Plaintiff's Exhibit No. 14 marked for identification and admitted in evidence.)

Mr. Sager: I will offer 15.

Q. Which was up on Exhibit 15?

A. You are holding that in the correct position for up.

Q. What is this white object?

A. That is part of the flour storage bin or conveyor system which we were talking about. [130]

Mr. Yothers: Subject to the same reservation, your Honor, no objection.

The Court: Let it be received.

(Plaintiff's Exhibit No. 15 marked for identification and admitted in evidence.)

* * *

Q. From there where did you go, Mr. Shallit?

A. I continued with my inspection of the flour conveying system and made an inspection of the elevator which is in the south portion of the flour storage bin, and the purpose of which is to convey

(Testimony of Fred Shallit.)

flour out of the flour storage bin. I removed the front housing in a manner similar to that which I removed the housing from the elevator previously referred to, and I observed six (6) live moths in this system and I estimated approximately fifty (50) larvae were inside this flour elevator.

I then removed the head of this elevator which is the top portion, and I observed that there were three (3) live moths and three (3) live larvae in the area of the head of the elevator.

I next began an examination of the overhead conveyor. Now this diagram shows it to be a little longer than it actually is. We examined the west section of this [131] overhead conveyor. It goes through the wall.

Q. Does the picture show it?

A. Yes, sir, it is shown in the upper right-hand portion of this picture.

Q. That is exhibit what?

A. Exhibit 12.

Q. All right. That elevator goes through that wall? A. Yes, sir.

Q. Go ahead.

A. By removing the housing which is on the west end of this overhead conveyor I saw larvae and insect webbing. I then proceeded to the east section. In other words, on the east side of this wall to which I referred, in order to continue with my inspection of this overhead conveyor by removing the housing in a manner similar to that de-

(Testimony of Fred Shallit.)

scribed. I also observed insect webbing and larvae in this screw conveyor.

Q. Now, showing you plaintiff's identification 16, that is a picture taken at that time?

A. Yes, this is a picture of it from the east side of this wall and shows the continuation of the overhead conveyor.

Q. And referring to plaintiff's Exhibit 12, is the overhead conveyor in 16 a continuation of that which is against and goes through the wall in [132] 12? A. Yes, it is.

Q. What did you find in that conveyor?

A. I found larvae and insect webbing in this conveyor.

Q. Okey, go ahead.

A. I next examined the scale hopper, the purpose of which, I understand, is to place certain amounts of weighed flour or semolina in a position to be properly manufactured.

Q. Is that shown in plaintiff's Exhibit 16?

A. Yes, sir, that funnel-shaped object is the scale hopper.

Mr. Sager: We will offer Exhibit 16, your Honor.

Q. You may go ahead.

A. I examined the scale hopper which consists of a cloth material on the bellow-shaped portion, which is attached with a hook, with a wire hoop, I should properly say. On the outside of the cloth I found three (3) live moths. I removed the cloth by removing the hoop and I found two (2) larvae

(Testimony of Fred Shallit.)

and insect webbing on the inside of this scale hopper. And that completed my inspection of the flour conveying system.

Q. All right.

A. I, of course, examined other——

Q. I will get to that in a moment. [133]

Mr. Yothers: A question or two about this Exhibit 16, Mr. Shallit. Is this your picture here taken at the time you were inspecting it, or who is it?

The Witness: That was a picture taken by Inspector Allen when he and I——

Mr. Yothers: Is this you up here, or is that an employee of the plant?

The Witness: That is a picture of myself, sir, yes.

Mr. Yothers: No objection, with the same reservation, your Honor.

* * *

(Plaintiff's Exhibit No. 16 marked for identification and admitted in evidence.)

Q. Where did you next go in the course of your inspection?

A. I then began an inspection of the noodle manufacturing equipment. This generally is conducted on this five-foot (5 ft.) elevated platform shown on the diagram. There I saw a dough kneader, which is a large cylindrical piece of equipment, the purpose of which is to soften or knead the dough.

The Clerk: No. 17 for identification.

(Testimony of Fred Shallit.)

Q. Showing you plaintiff's identification [134] 17, is that a picture of the dough kneader?

A. Yes, sir.

Q. Taken at that time? A. Yes, sir.

Q. Does that fairly represent it?

A. It does.

Mr. Yothers: What is that again?

Mr. Sager: 17.

Mr. Yothers: What is it?

The Witness: I called it a dough kneader.

Mr. Sager: We offer the exhibit.

Mr. Yothers: Subject to the same reservation.

The Court: Very well, let it be received.

(Plaintiff's Exhibit No. 17 marked for identification and admitted in evidence.)

Q. What examination did you make of this dough kneader, Mr. Shallit?

A. This dough kneader was empty except for the fact that it had been greased. Adhering to the grease on the bottom of this dough kneader I counted ten (10) dead moths.

I then examined two (2) small tables approximately two feet (2 ft.) square at the top. They are not shown in this diagram, but they would be approximately to the southeast of the dough kneader. There were on each of these two (2) small tables was a cloth sack thrown over it. [135] I found one (1) larva in each of the cloths I examined. I found insect webbing in each of the cloths examined, and I found one (1) live larva

(Testimony of Fred Shallit.)

each in a crack in each of the tables and insect webbing in each of these tables.

Q. And what were these tables used for?

A. Mr. Mulvaney explained to me that as the dough is removed——

Mr. Yothers: Object to that, your Honor, testimony about Mr. Mulvaney, what was said to him not in the presence of defendant. Admittedly he was not there.

The Court: Objection sustained.

Mr. Sager: It would be admissible against the corporation defendant.

The Court: On the grounds that he is an employee?

Mr. Sager: That he represents the corporation, speaking for it.

The Court: There is some testimony that he subsequently came and gave his permission in addition to that already given by McDiarmid, so I will allow it upon that theory.

Q. You may continue.

A. The dough as it is removed from the kneader is placed on these tables for further [136] manipulation.

Q. Then where did you go?

A. I noted before I made any further examination of the noodle manufacturing equipment that there were twenty (20) sacks over a railing. This five-foot (5 ft.) elevated platform has a small wooden railing coming up from it and over, draped over this railing in the eastern section of it, as I

(Testimony of Fred Shallit.)

recollect, were twenty (20) sacks. I examined four (4) of these sacks and found——

Q. What sort of sacks were they?

A. They were flour sacks, typical sack which is used to contain flour. They appeared to me to be similar to the same type of sack that was thrown over the two (2) small tables which I mentioned. I examined four (4) of these sacks and found larvae on all of them. I took one sack and carefully counted the number of larvae which I could observe and I counted twenty (20) larvae on this sack.

I then proceeded to the southwest section of this same raised platform and examined what is termed an enrichment tank. This tank is used to dissolve the enrichment tablets which are subsequently used in the manufacture of the products. This tank——

Q. That would be vitamins and that sort of thing?

A. Vitamins, yes, sir. This tank contained about four inches (4″) of what appeared to be water and a yellowish material mixed in with it. At the bottom of this tank I [137] counted four (4) dead moths.

Q. In the liquid that was in it?

A. It was in the liquid, sir, yes.

Q. And was a picture taken of that?

A. Yes, sir.

Q. Plaintiff's Exhibit 18 for identification, is that the picture that was taken of that tank and its contents? A. That is correct.

Q. Does it fairly represent it? A. It does.

(Testimony of Fred Shallit.)

Mr. Sager: We will offer the exhibit.

Mr. Yothers: Referring to Plaintiff's Exhibit 18, Mr. Shallit, can you clarify this for us. Are these one (1), two (2), three (3), four (4), are they the four (4) moths you refer to?

The Witness: Yes, sir.

Mr. Yothers: Subject to the same objection, your Honor.

The Court: Let it be received.

(Plaintiff's Exhibit No. 18 marked for identification and admitted in evidence.)

Q. All right, where did you next go, Mr. Shallit?

A. I next noted that directly to the north of this enrichment tank and approximately four or five feet (4 ft. or 5 ft.) from it was a paper bag such as is used to contain [138] flour. It now contained string and paper and similar debris. I saw on the outside of this paper bag six (6) live moths.

That completed my inspection of the noodle making equipment. From there I proceeded to descend from this platform and I went back to the southwest section which is shown in the lower right-hand corner of this diagram. I observed a macaroni grinder. I opened a plate on the macaroni grinder and I observed that there was a considerable amount of insect webbing and larvae entangled in the insect webbing.

Q. Was a picture taken of that?

A. Yes, sir.

(Testimony of Fred Shallit.)

Q. Showing you plaintiff's identification 19, is that the picture that was taken?

A. That is the picture.

Q. And does it accurately represent what it purports to show? A. It does.

Mr. Sager: We will offer Exhibit 19.

Mr. Yothers: Will you point out in this exhibit, Mr. Shallit, the insect webbing that you refer to?

The Witness: Yes, sir, this is insect webbing which has flour adhering also to it.

Mr. Yothers: Kind of loose like icicles [139] or frosting or something like that, is that it?

The Witness: This specific part of it is, sir, and this is and this is (indicating). This other material is flour (indicating).

Mr. Yothers: This is flour?

The Witness: Principally flour.

Mr. Yothers: Subject to the same objection.

The Court: Very well, it will be received.

(Plaintiff's Exhibit No. 19 marked for identification and admitted in evidence.) [140]

* * *

COLLEEN DICECCO

being first duly sworn on oath was called as a witness on behalf of the plaintiff and testified as follows:

Direct Examination

By Mr. Dickerman:

Q. State your name. A. Colleen Dicecco.

Q. Where do you live, Mrs. Dicecco?

(Testimony of Colleen Dicecco.)

A. 1133 Perkins Way.

Q. In Seattle? A. Yes.

* * *

Q. Were you employed by the Golden Grain Macaroni Company? A. Yes.

Q. During what period of time did you work there?

A. From April until around the end of June or the beginning of July.

Q. Of what year? A. 1951.

Q. And what were your duties while you were there?

A. We had to pack macaroni and the macaroni and spaghetti that fell on the floor we had to pick up and put back into the machine and pack that too. [141]

* * *

FRED SHALLIT

having been previously sworn resumed the witness chair on behalf of the Plaintiff and continued testifying as follows:

Direct Examination
(Continued)

By Mr. Sager:

Q. Mr. Shallit, what did you examine after you had examined this macaroni grinder? Had you finished with your testimony regarding your inspection of the macaroni grinder?

A. Yes, sir.

(Testimony of Fred Shallit.)

Q. All right, where did you go next?

A. I then began an examination of the drying equipment and if I may illustrate again, the drying equipment consists of two (2) vertical continuous driers which are shown in the southeast section, a series of drying rooms on the east section and on the west section of the second floor.

I looked through the front of the drier which is on the—to the north and—the front of the drier is actually on the west side—and I saw insect webbing in the belting.

I lifted the window and observed that it was definitely insect webbing. I then proceeded to the north side of this drier and I removed a panel so that I could see into the drier. On the panel I saw insect webbing and cocoons and inside the panel I observed—excuse me. Inside the main part of the drying machinery I observed one (1) live larva and additional insect webbing. [143]

I then began an inspection of the drying rooms on the west side and I examined a drying room which I designated as the second drying room on the west side.

* * *

A. (Continuing): I observed in this drying room that there were trays of noodles being dried and I saw in one such tray two (2) live moths.

Q. And was a picture taken of that?

A. Yes, sir.

The Clerk: Plaintiff's Exhibit 20 for identification.

(Testimony of Fred Shallit.)

Q. And is plaintiff's identification 20 the picture that was taken of that tray? A. Yes, sir.

Q. Does that fairly represent what it shows?

A. Yes, it does.

Mr. Sager: I will offer the exhibit.

Mr. Yothers: In this plaintiff's Exhibit 20 I assume that this pencil that is showing, that [144] you placed it there yourself, is that correct, to indicate the presence of the moths that you saw?

The Witness: We placed the pencil there to point towards the moths which we saw.

Mr. Yothers: Are those the small dark grey objects at the end of the pencil; are those the moths you refer to?

The Witness: That is right, sir.

Mr. Yothers: Could you tell me, Mr. Shallit, which of the four (4) sections that you refer to, the drying rooms, that this particular picture was taken of?

The Witness: That would be in what I term the second drying room from the north side of the building.

Mr. Yothers: In your Exhibit No. 9 it is divided up into quarters. Was it from the second quarter of that drying room? Is there divisions in the drying room?

The Witness: There are doorways. One enters the drying room through doorways. There is a doorway approximately there (indicating).

Mr. Yothers: This is the second doorway from

(Testimony of Fred Shallit.)

the right-hand side as you approach it, is that [145] right?

The Witness: Well, as you approach it would be on the right side.

Mr. Yothers: The second one from the right?

The Witness: Right side.

Mr. Yothers: With the same reservation, your Honor, no objection to it.

A. (Continuing): I then examined some of these trays which contained the noodle products and of six (6) trays I examined I found insect webbing in the corners of each of these six (6) trays.

The Court: This exhibit will be received in evidence.

(Plaintiff's Exhibit No. 20 marked for identification and admitted in evidence.)

Q. Go ahead.

A. I then proceeded to the east section of the second floor and began an examination of a drying room which I termed drying room No. 8 for the purpose of my notes.

* * *

A. (Continuing): And I examined trays containing noodles that were in this room and again I observed that some trays did contain insect webbing in the corners.

Q. What sort of trays were they?

A. These are approximately four feet (4 ft.) long [146] and perhaps about two feet (2 ft.) wide.

(Testimony of Fred Shallit.)

They are made of wood about two inches (2") thick and they have a screening nailed to the frame.

Q. Wood frame with the bottom made of screening? A. Yes, sir.

Q. Okey. In Exhibit 20 this shows the screened bottom of one of the trays?

A. Yes, that would be part of the screen bottom.

Q. Does that picture show the way the noodles are laid in these trays for drying?

A. Yes, it does.

Q. Continue, Mr. Shallit. What else did you observe in this place?

A. In the course of my inspection I visited various drying rooms, what I termed No. 8 and No. 7 and drying room No. 3, and I obtained various samples of the drying materials which I placed in clean kraft bags as exhibits.

That completed my inspection for the most part to my present recollection of the second floor.

Q. Well, now, this is all up on the top floor?

A. I made further inspection of the second floor, sir.

Q. You also inspected the second floor?

A. If I may explain. This is termed the top floor. There is also a main floor and there is also a basement.

Q. Well, showing you plaintiff's identification 10, [147] is that what?

A. This is more or less a schematic diagram of the main floor of the Golden Grain Macaroni Company of Seattle.

(Testimony of Fred Shallit.)

Q. Made under your supervision?

A. Yes, sir.

Q. And does it show with reasonable accuracy the layout or plan of the main floor?

A. Yes, sir.

Mr. Sager: We will offer the exhibit.

Mr. Yothers: Subject to the reservation previously made, your Honor, I have no objection to that.

The Court: Very well, let it be received.

(Plaintiff's Exhibit No. 10 marked for identification and admitted in evidence.)

Q. Generally, what operations in the manufacture of the macaroni products are carried on in this floor, Mr. Shallit? The main floor.

A. In the southeast section, which is the section walled off, is the packing equipment. All the packaging isn't done in this area, but it is a place where extensive packaging is done. Also, certain trays of alimentary pastes are in this area on drying trays.

Q. All right, and what inspection, examination did you make on that floor and what did you [148] find?

A. I saw both empty and full drying trays in the southeast area of the packing room. I examined various empty trays and various trays also containing alimentary pastes, and I found evidence of insect webbing and one (1) larva both in the empty trays and in the full trays in some of them.

Q. In some of them?

A. In some of them, yes.

(Testimony of Fred Shallit.)

Q. Anything else there on that floor?

A. I don't believe so, sir.

Q. Now, did you, did that complete your inspection then on this occasion?

A. That completed my inspection of the first floor.

Q. Did you go back there at a later time?

A. Yes, I returned to this plant on July 31, 1951.

Q. And did anybody accompany you on that occasion?

A. Inspector Horace Allen was also with me.

Q. The same one that was on the occasion you just talked about? A. Yes.

Q. Who did you see there on that occasion?

A. Mr. Dedomenico was present in the office. We introduced ourselves again.

Q. That is Mr. Paskey Dedomenico, the defendant? A. Yes, sir. [149]

Q. All right.

A. We stated that we wished to make another factory inspection. Mr. Dedomenico invited us into his office where we chatted for, oh, approximately an hour and in our conversation we told him of our findings on the previous inspection of July 18th and 19th and there was some general discussion of the plant itself.

Q. Well, now, on this occasion, on July 31st, did you ask permission of Mr. Dedomenico to make an inspection? A. Yes, I asked permission.

Q. What did he say?

(Testimony of Fred Shallit.)

A. Mr. Dedomenico said go right ahead to make our inspection. [150]

* * *

Q. Did you talk to Mr. Mulvaney during the course of the inspection?

A. Yes, Mr. Mulvaney very courteously allowed me to make my inspection originally in that when we began our inspection [151] of the flour conveying system it was in operation. I asked Mr. Mulvaney, "May I make my inspection?" and interrupt his work. He very graciously allowed me to. Then, later on, about fifteen (15) minutes later, I told Mr. Mulvaney that the insect filth I found was of great amount and I suggested to him that he probably would not want to continue to dump semolina into the hopper until we completed our inspection, and that he might possibly wish to clean the entire equipment up after we completed our inspection. He was very agreeable and he said that he would take my advice. I explained to him that it was purely advice. I had no authority to tell him what to do, but I was suggesting that it would be a proper procedure on his part.

Q. Well, did he suspend the operation of that machinery while you continued in your inspection?

A. Yes, sir. He suspended that portion of the operation completely and I noted after, as I was leaving the area, that both he and another workman were working on the equipment to clean it up.

Q. Now, getting back again to the inspection you

(Testimony of Fred Shallit.)

made on July 31st, did you make a further inspection of the premises on that occasion?

A. I made another inspection of the flour conveying equipment which was not nearly as detailed as the inspection [152] which I just related.

Q. Did you examine the same general equipment?

A. I examined the hopper, the screw conveyor, the elevator, the main flour storage bin and the dough kneader and the small enrichment tank and some of the screens.

Q. What did you find?

A. I found that although the evidence of insect filth was not nearly as impressive as that which I had found on my previous inspection there were still live moths present and insect webbing and dead moths and larvae.

Q. In all of these various locations?

A. Generally speaking, unless you wish me to go through it step by step, in the same general area as I observed the other infestation.

Q. I understood you to say from time to time, Mr. Shallit, that, during your testimony here, that you took samples from these various parts of the machinery and areas that you were examining?

A. Yes, sir. [153]

* * *

(Testimony of Fred Shallit.)

Direct Examination
(Continued)

By Mr. Sager:

Q. Mr. Shallit, showing you what has been identified as plaintiff's Exhibit 21, will you state what the exhibit is?

A. Exhibit 21 is flour from the screw conveyor directly behind the hopper which was on the top floor as illustrated in the previous diagram.

Q. Would that be from this conveyor?

A. Right, sir.

Q. That is Exhibit 11?

A. That is right, sir.

Q. And how did you take that sample from there?

A. I had a clean glass jar, this jar with a cover on it. I removed the cover and with the aid of a large spoon I held the jar into the flour and scooped the flour into the jar, and then I replaced the cover.

Q. Is there anything visible in there except flour?

A. Yes, there are moths in this flour. I might also add there is a piece of paper present which was added later. That paper contains chloroform to kill the live infestation. [156]

Q. Is that true of these other exhibits where paper is present in them?

A. That is correct.

Q. That is your means of fumigating whatever might be alive in the exhibit?

(Testimony of Fred Shallit.)

A. That is correct.

Mr. Sager: I will offer Exhibit 21, your Honor.

Q. Showing you plaintiff's identification 22, will you state what that is?

A. Exhibit 22 is webbing and insect filth collected from inside of this same screw conveyor as I just previously testified to.

Mr. Sager: I will offer Exhibit 22.

* * *

Q. Showing you plaintiff's identification 23, what does that exhibit consist of? [157]

A. Exhibit 23 is material sifted out of approximately ten pounds (10 lbs.) of static stock which was obtained from the elevator which is adjacent to the hopper which I referred to just previously.

Q. Does that show in this picture (indicating)?

A. No, sir, that would be the reversed side of it. That doesn't show, but it would be slightly below where that long shaft comes down.

Q. Down at the bottom here (indicating)?

A. If I may point a moment, sir. It would be at the bottom of this elevator (indicating). There is a sliding port door and from the sliding port door this Exhibit 23 was obtained.

Q. Is that what you identified as the boot of this elevator? A. That is right, sir.

Q. This is Exhibit 12 that you have referred to, the picture? A. Yes, sir.

Q. Now, you used the term static flour. What do you mean by that?

(Testimony of Fred Shallit.)

A. In a bucket elevator from the very nature of the elevator, we have our buckets on chains which are, of course, going around in a complete circle. Housing these bucket elevators is the casing which in this case was wood. At [158] the very bottom of this casing where the elevator makes the turn will be an accumulation of flour which we would call static flour in that it wouldn't move as rapidly as the flour conveyed by the buckets themselves. In fact, the very bottom part of that flour, the very boot or bottom of the elevator will remain fairly dormant.

Q. I see, and it is from that spot or place that you gathered this sample?

A. That particular sample.

Q. Exhibit 23.

A. We took approximately ten pounds (10 lbs.) of flour from this boot, sifted it through a two hundred fifty (250) mesh screen and that material is what remained in the screen after we sifted it.

Q. And what is the material in there then?

A. It is insect webbing and larvae in the webbing.

Mr. Sager: We offer Exhibit 23.

Q. Showing you identification 24, what is that exhibit?

A. Exhibit 24 is webbing, larvae and adult moths taken from the elevator head leading into the flour storage bin.

Q. Referring to plaintiff's Exhibit 12, the head would be this upper portion of this elevator?

(Testimony of Fred Shallit.)

A. That is right, after the casing was removed. After [159] the housing was removed.

Q. And what is in that exhibit?

A. This again is webbing, larvae and adult moths will show in it.

Mr. Sager: We offer Exhibit 24.

Q. And handing you plaintiff's identification 25, from what place in the plant did you obtain that?

A. Exhibit 25 is webbing and larvae scraped from the wall directly to the east of the main flour storage bin.

Q. Is that the same portion of the wall shown in the picture which is plaintiff's Exhibit 15?

A. That is right, sir.

Mr. Sager: We will offer that exhibit.

Q. Showing you plaintiff's identification 26, what is that exhibit?

A. Exhibit 26 is a small portion of noodles with insect webbing and insect excreta taken from a tray located in the drying room which I designated as drying room No. 2, and this tray contained noodles in it that were drying.

Q. The major contents of that jar is apparently paper that you put in to fumigate, is that right?

A. That is right.

Q. The actual noodle part of infestation is shown there at the bottom, the dark spot?

A. That is correct. [160]

Mr. Sager: We offer Exhibit 26. You may inquire.

Mr. Yothers: Mr. Shallit, as to these exhibits

(Testimony of Fred Shallit.)

you have here, Exhibits 21 through 26, those exhibits that contain flour, I notice they each contain a little piece of paper. What did you say that was added for?

The Witness: That is chloroform which has—the paper is first soaked in the chloroform and then added to the jar in order to kill the live infestation which might be present.

Mr. Yothers: When was that added, Mr. Shallit?

The Witness: On the evening of the 18th. These were all added the evening of the 18th at the Federal Office Building.

Mr. Yothers: That has the effect then of killing any of the moths that might be present in the exhibit?

The Witness: The purpose of it, if I may explain just a bit, is to kill the live insect infestation so it will not progress any further.

Mr. Yothers: It won't kill any eggs, will it?

The Witness: I am not acquainted whether it will or not.

Mr. Yothers: It won't kill any of the [161] pupae?

The Witness: I am not an authority on that, sir.

Mr. Yothers: Is it possible then, Mr. Shallit, or do you know that the moths contained in here could have hatched in the flour itself?

The Witness: Would you tell me what specific sample you are referring to?

Mr. Yothers: Let's take sample 21 which contains considerable flour.

(Testimony of Fred Shallit.)

The Witness: May I bother you to see that?

Mr. Yothers: Yes, sir.

The Witness: Oh, Exhibit 21, in taking this sample, this sample was taken, if I may explain in a little more detail——

Mr. Yothers: Well, can you answer my question first and then give the explanation that you wish to give about it?

The Witness: Would you repeat the question?

Mr. Yothers: It is possible that the moths contained therein could have hatched in the flour after you took the sample, is that correct?

The Witness: I am not an authority on whether or not they could in that, as I stated, whether the chloroform will completely kill them. I can't [162] state.

Mr. Yothers: So you don't know whether or not there are any more moths in this flour than were in there at the time you took it or not?

The Witness: No, I do not.

Mr. Yothers: And would the same thing be true as to the other exhibits, Mr. Shallit?

The Witness: That is correct, sir.

Mr. Yothers: So these exhibits that you have obtained to be introduced here may or may not be in the same condition as they were at the time you took them insofar as the moth infestation is concerned?

The Witness: I can state merely from my training and experience what our procedure has been and what our accepted procedure has been, sir.

(Testimony of Fred Shallit.)

Mr. Yothers: In other words, you don't know, is that right?

The Witness: That is correct, sir.

Mr. Yothers: Your Honor, counsel has asked to introduce these exhibits. I object to the introduction of the exhibits on the ground stated relative to the qualifications and the objection to the evidence and further on the ground that so far as these exhibits are concerned, the witness has testified that they may or may not be in the [163] same condition, and he doesn't know whether they are in the same condition now insofar as the moth infestation is concerned and the insect development as they were at the time he took them. I therefore, on both those grounds, I object to the introduction of the Exhibits 21 through 26.

The Court: Objection overruled. Exhibits 21, 22, 23, 24, 25 and 26, heretofore admitted for identification, will be received in evidence.

(Plaintiff's Exhibits Nos. 21, 22, 23, 24, 25, 26 marked for identification and admitted in evidence.)

The Court (Continuing): I want to point out that had the contents of those exhibits been pure from the very beginning, there would be no question about it. There certainly is evidence that there is infestation within the exhibit; whether it progressed to any degree is unimportant as long as it was there initially.

(Testimony of Fred Shallit.)

Cross-Examination

By Mr. Yothers:

Q. Mr. Shallit, referring to your Exhibit No. 25—strike that. Referring now to your Exhibit No. 26, you say this represents the webbing that you found from one of the [164] drying trays, is that correct?

A. This represents some of the webbing which I found in a drying tray.

Q. Where did you find that webbing, where in the drying tray was it?

A. This was in the corner where the wood joins the screening and where noodles were in direct contact with the screening.

Q. How did you get the webbing out? Can you describe the procedure that you followed to get this webbing?

A. I took with my fingers in this particular case and lifted the noodle, found the webbing was adhering to the noodle, and to the wood. I detached the webbing from the wood and left it remaining to the noodle.

Q. Now, what is the general size of these trays? Would it be approximately correct to say it is about the size of this table here?

A. It would be perhaps just a little narrower than that, sir, and perhaps about four feet (4 ft.) long.

Q. Little narrower and about four feet (4 ft.) long?

(Testimony of Fred Shallit.)

A. I would estimate between two feet (2 ft.) wide and four feet (4 ft.) long.

Q. Is that the total amount of webbing that you found in that tray?

A. That was approximately all the webbing that I [165] found in that tray.

Q. How many trays were there at the time?

A. In this particular drying room there were, I counted twenty-six (26) trays.

Q. Did you take samples of webbing from any other tray?

A. Of webbing from any other trays in this drying room, sir?

Q. Yes. A. Not from this drying room.

Mr. Sager: What is that exhibit No.?

Mr. Yothers: 26.

Mr. Sager: Thank you.

Q. Well, if there had been webbing present in the other trays, Mr. Shallit, would you have taken samples of it?

A. No, sir. I testified previously that there was webbing present in the other trays. I did not take from all.

Q. How many other trays had webbing in them?

A. In drying room No. 2, sir?

Q. In the same place where you got this Exhibit 26? A. Six (6) trays.

Q. Six (6) other trays out of the twenty (20)?

A. Total of six (6) trays, sir.

Q. Total of six (6) trays? A. Yes. [166]

Q. And how much webbing did each of the six

(Testimony of Fred Shallit.)

(6) trays have in it, in excess of this, the sample which you took?

A. I believe that would be representative of the general picture of the webbing in these trays.

Q. Did you take samples of webbing from any other drying room?

A. Not from any other drying room that I can recollect right now of webbing, sir.

Q. Mr. Shallit, you have confined the testimony here to the moth, the pupa, the larva and the webbing. Those are all part of the life cycle of the same insect, is that correct?

A. That would be the same life cycle, sir.

Q. And is that the basis from which you say, and I think you testified, that the conditions were filthy there at the plant, is that correct?

A. The insect infestation is what I would consider to be the filthy element.

Q. That is the only thing you considered in determining whether the plant was sanitary or unsanitary?

A. I believe principally, I will state, that is probably, to my best knowledge at the moment unless I recollect further, that is my basis of my opinion.

Q. Well, you made checks, did you not, to determine whether or not there were any rats or rodents, mice or [167] excreta from any of those animals around? A. That is right, sir.

Q. You didn't find any?

A. The amount of such filth that I found I con-

(Testimony of Fred Shallit.)

sidered, from my experience as an inspector, to be negligible.

Q. And what about the conditions so far as flies?

A. I can recollect no flies in the plant.

Q. Then, with the exception of this moth condition there was no other unsanitary or insanitary condition to your knowledge and recollection at that plant at the time you made your inspection on July 18th and 19th?

A. I believe that is correct, sir.

Q. The employees were clean and worked in sanitary conditions, did they not?

A. Yes, I was satisfied that they were.

Q. Furnished with clean uniforms?

A. That is right, sir.

Q. Employees, the women employees required to wear hairnets? A. Yes.

Q. Employees all had health cards?

A. I didn't check that.

Q. Did you discuss with any of the employees, sir, other than Mr. Mulvaney or Mr. McDiarmid the conditions, rules or regulations under which they were to work in the [168] manufacture of the products that they were working on?

A. Well, I discussed no rules or regulations with anyone. I have no authority to do that.

Q. I see. Now, you testified here relative to the life cycle of this moth or insect which is the basis for your belief that there was an unsanitary condition there. Can you tell us what is the ordinary life cycle of a moth?

(Testimony of Fred Shallit.)

A. I am not an entomologist. I can tell you what I have read in the literature.

Q. Well, based upon your experience, do you have any knowledge as to what is the life cycle of the moth?

A. Not from my experience, sir, no.

Q. Can you tell us whether or not during periods of warm weather or hot humid weather that the life cycle of the moth is speeded up?

A. No, I don't consider myself——

Q. Do you know what effect the increase in the life cycle of the moth would have upon moth infestation in flour?

A. Specifically on moths, I couldn't state. I can state in general that proper warm conditions will increase the life cycle of insects and plants.

Q. And it is possible, is it not, to clean these various pieces of machinery used in the production at the plant of macaroni say on Monday of a week or on July 14th or 15th and yet the moths will be present on the 18th or 19th? [169]

A. You would like me to speak from my education, sir?

Q. Based upon your knowledge and experience, Mr. Shallit.

A. On my knowledge, sir, which would come, of course, from the literature, may I include that?

Q. Yes, sir.

A. The literature, of course, generally gives the life cycle of the Mediterranean flour moth as eight (8) weeks. From my experience and my knowledge

(Testimony of Fred Shallit.)

and my education and literature, I would state that the entire life cycle would take approximately eight (8) weeks. Therefore, if I see an adult moth I would, in my opinion, believe that that adult moth originated approximately eight (8) weeks ago.

Q. And what would be the cycle between the pupa stage and the moth stage?

A. I don't know the time element.

Q. A total of eight (8) weeks is the cycle from egg to pupa to moth to egg?

A. From egg to larva to pupa to the emergence of the adult moth.

Q. Now, do you know where these moths come from, are they present in the flour, the raw product as used in the manufacture of macaroni products?

A. I am not an authority on that, I don't know.

Q. Well, you have read considerable literature on it, [170] have you not?

A. No, I haven't read too much literature on that.

Q. You say based upon your knowledge and experience as an inspector you don't know where these moths come from?

A. I have read that this particular type of moth is known as a flour storage moth. In other words, it will infest stored materials.

Q. You know, as a matter of fact, do you not, from your knowledge and experience and what you have read, that there is no such thing as an insect moth-free flour?

A. I have heard the discussion and read some of

(Testimony of Fred Shallit.)

the discussion that there are possibilities, that it is impossible to have a ton of flour or any set quantity of flour absolutely free from insect fragments.

Q. Now, referring to Exhibit No. 23, I believe you stated it is the material you sifted out of ten pounds (10 lbs.) of flour on a twenty (20) mesh screen, is that correct? A. That is right, sir.

Q. Are you familiar with the size and type of this screen that is used there at the Golden Grain Macaroni Company in the manufacture of their product?

A. What screen are you referring to?

Q. Screens that they use on their sifters.

A. I made estimates of the sifter, of the size of the screen that was over the main flour storage bin. [171]

Q. And what size was that?

A. I estimated it to be approximately one-sixteenth of an inch (1/16″), a sixteenth or perhaps a thirty-second of an inch (1/16″ or 1/32″).

Q. Is that larger or smaller than a twenty (20) mesh screen?

A. Thirty-second of an inch (1/32″) would be smaller than a sixteenth of an inch (1/16″).

Q. So that the screen they use to sift out the flour and sift out these foreign materials was actually finer than the screen you used to sift out this material in 23?

A. It was approximately the same size.

Q. About the same size? A. Yes, sir.

Q. Now, how many sifters did they use in the

(Testimony of Fred Shallit.)

process of sifting the flour out before it goes into the product?

A. I noted sifters in my examination. I can't say if there were more, but I examined two (2).

Q. I believe you also testified, Mr. Shallit, did you not, that you found some moths and larvae, webbing around the throw-out; is that correct? That is, it would be behind the sifter?

A. I testified, as I recollect, that I found webbing and larvae on that throw-out.

Q. And what is the purpose of the throw-out, sir? [172]

A. The throw-out, the entire sifter is to remove coarser materials such as paper, string and other debris which might fall initially into the hopper, into which the hopper is primarily dumped.

Q. Also to catch moths and things of that sort, is it not? Anything that is larger than the flour grain itself?

A. Anything larger than the screening, sir, would naturally be removed.

Q. That is the very purpose of it, is it not?

A. Yes, that is correct.

Q. That is one of the sanitary features of a good macaroni plant, good sanitary macaroni plants, to have proper sifters in it, is that correct?

A. That is correct.

Q. Would you say the sifters at the Golden Grain Macaroni Company were good sifters?

A. I think they were good sifters.

Q. Mr. Shallit, what procedures were used out

(Testimony of Fred Shallit.)

there at the Golden Grain Macaroni Company at the time you made your inspection on the 18th and 19th which were not good sanitary practices and procedures? A. What procedures that I did?

Q. No, no, no, excuse me. I will rephrase that question again. What procedures did you observe were being used at the Golden Grain Macaroni manufacturing plant when you inspected it on July 18th and 19th which were not good [173] sanitary practices and procedure in the manufacture of macaroni?

A. My principal observation in that respect would be on the initial investigation in which flour, semolina, more correctly, was being dumped into a hopper in which I observed considerable insect filth. Now, I don't consider that obvious insect filth being incorporated with flour is a good sanitary procedure.

Q. That procedure was at a point in the process prior to the time it went through the sifter, is that correct? A. Yes, sir.

Q. Were there any other procedures that you observed out there which in your opinion were not proper sanitary procedures?

A. I don't believe so.

Q. That is the only one? A. I believe so.

Q. Did you have any guides or standards that you follow in making inspections and that you did follow on July 18th and 19th to make a determination as to whether or not conditions you observed were sanitary or unsanitary other than those you testified to now?

(Testimony of Fred Shallit.)

A. Well, I, of course, guide myself from my experience as an inspector, from my factory inspections I have made. [174]

Q. Have you inspected other macaroni plants, sir? A. I have.

Q. In this immediate area? A. I have.

Q. And how often have you made those inspections, sir? A. How often, sir?

Q. Yes.

A. I wouldn't be able to answer you specifically.

Q. I will ask you this question: How many inspections have you made, or did you make in June and July of 1951?

A. I made one other inspection in July of 1951.

Q. In July of 1951? A. Right, sir.

Q. In a plant other than the Golden Grain Macaroni? A. Yes, sir.

Q. How often have you made an inspection out at Golden Grain Macaroni Company other than the three (3) times you have testified to here?

A. I have made inspections a few years prior to July 18th and 19th.

Q. Now, this other plant that you inspected in July of 1951, would you say it was in a sanitary condition?

A. In my opinion it was a sanitary plant.

Q. Was it in any better sanitary condition than the Golden Grain Macaroni Company? [175]

A. Yes, sir.

Q. And were there any moths present in that plant? A. Yes, sir.

(Testimony of Fred Shallit.)

Q. Where were those moths present?

A. I found two (2) moths present in that plant.

Q. Whereabouts?

A. In the area of the flour bin, main flour storage bin.

Q. And did you find any rat or rodent excreta or rat or rodent evidence or any evidence of rodent present in that plant? A. I found none.

Q. What plant was that that you inspected, sir?

A. That was the Mission Macaroni Company.

Q. Mission Macaroni?

A. Yes, sir, in Seattle.

Q. Now, what procedures did you follow in making inspection of that plant, sir?

A. I began much as I began in this, with the Golden Grain in that I first inspected the flour conveying system, the flour that was stored.

Q. Static flour in the bucket conveyor there?

A. There was static flour.

Q. You found no moths there?

A. No moths. [176]

Q. No larvae? A. No, I found no larvae.

Q. No webbing?

A. I found webbing in the main flour storage bin in two clumps of it.

Q. Do you have your notes of that inspection with you?

A. I have notes on that inspection, sir.

Q. I ask you to produce them.

Mr. Sager: Now I am going to object to that,

(Testimony of Fred Shallit.)

your Honor, because it is not material in any event whether some other factory is clean or unclean.

The Court: Objection sustained.

Mr. Sager: No bearing upon the condition of this factory.

Mr. Yothers: Your Honor, I'd like to make an offer of proof relative to this matter.

The Court: If you are going to make an offer of proof that comparison would show the difference between this plant and the one heretofore inspected of the Mission Macaroni, I will not entertain it. What is the nature of your offer please?

Mr. Yothers: The nature of the offer of proof, your Honor, is that this inspector about [177] the same time made an inspection of the Mission Macaroni plant, that if he produced his notes of his inspection the notes and he would testify as to the conditions that he found which were comparable to the conditions that he found at the Golden Grain Macaroni plant. Based upon that, he made assumptions in both cases, one of them contrary to the other that one was a sanitary condition and the other was an unsanitary condition. He has taken the stand here as an expert witness testifying as to what is sanitary and what is unsanitary. That is a question of fact and it can be supported by evidence by expert witnesses and by lay testimony.

Here they have attempted to support it by an expert witness who bases his opinion on certain facts he found. Now, on cross-examination we desire to show that upon a similar set of facts and similar

(Testimony of Fred Shallit.)

circumstances he arrived at an entirely different conclusion.

The Court: Offer of proof is denied. I am not here to try the sanitation or lack of sanitation of the Mission Macaroni Company. I am here to try the sanitation features of this particular case. [178]

* * *

Q. Yes. Did you make any determination at the time you made your inspection on July 18th and 19th as to the general cleaning procedures which were followed by the employees of the Golden Grain Macaroni Company?

A. I made no inspection of their procedures.

Q. Did you make any determination whether or not they had or were using a system of spraying or fumigation of the raw product, that is, the flour and of the equipment itself?

* * *

A. I can relate a discussion I had with Mr. McDiarmid to that effect.

Q. Other than that you have no information of your own knowledge, is that right? [179]

A. I have information of the spray that was used in that——

Q. What spray were they using?

A. It was a two per cent (2%) chlordane spray.

* * *

Q. Is that the same type of spray that is used throughout the industry in the local area for the purpose of controlling moths?

(Testimony of Fred Shallit.)

* * *

A. I hesitate to recommend a chlordane spray. It is a poisonous spray.

Q. I beg pardon?

A. A chlordane spray is a poisonous spray and if used should be used with caution and it should not come in direct contact with a food material.

Q. At the time you made your inspection, Mr. Shallit, did you see any evidence of any moldly or decomposed materials being used?

A. No, I did not.

Q. Moldly or decomposed material in the food product itself? A. No.

Q. Is it possible, Mr. Shallit, for a manufacturer [180] of semolina products to manufacture that under conditions that are absolutely free from moths, larvae, webbing?

A. You state a manufacturer of semolina or semolina products?

Q. Of semolina products, of macaroni, spaghetti and noodles?

A. To be absolutely free, you mean not a single insect or any other evidence of insect in the plant?

Q. Yes.

A. I have seen plants without evidence of it, sir, but ordinarily you will find some slight evidence of the presence.

Q. And the presence or absence of moths depend upon the temperature, depend upon the type of wheat that is used, does it not?

(Testimony of Fred Shallit.)

A. Are you making that statement, sir, or asking?

Q. I am asking you if that is not true?

A. The presence of the moth depends upon the temperature, you say?

Q. Yes, the presence or absence of moths and larvae?

A. They have to be initially present, of course, before the temperature will have any effect on them.

Q. I understand that. The product, this they use, which is flour, is never free from insects, from moths, infestation? [181]

A. I have stated that from my literature which I have read and from the conversations which I have had, ordinarily flour and related products may not be one hundred per cent (100%) free from insect filth.

Q. Well, you are familiar with the bulletins and regulations of Mr. George Larrick, are you not?

A. Not all of them, sir, by any means.

Q. Beg pardon?

A. Not all of them, sir, not by any means.

Q. Well, you remember the statement of Mr. George Larrick in which he advised that it is impossible for any manufacturer to manufacture semolina products or farinaceous products completely free from moth infestation, that there is no such thing as one hundred per cent (100%)?

A. Do you have that statement here?

Q. Beg pardon?

A. Do you have that statement?

(Testimony of Fred Shallit.)

Q. Yes. A. May I see the statement?

Q. The statement is: "We know for example——

* * *

Mr. Sager: Just a moment, just a moment.

If the Court please, I object to reading any [182] statement under those circumstances unless it is identified.

The Court: Objection sustained.

Mr. Sager: I move the statement read by counsel be stricken.

The Court: It may go out.

Q. Did you make an inspection of the Golden Grain Macaroni plant, sir, in May or June of 1951?

A. May or June? No, sir, I did not.

Q. The inspection upon which your testimony is based then in this matter is the inspection that you made on July 18th and 19th, is that correct?

A. I have also referred to July 31st.

Q. And July 31st? A. Yes.

Q. Is that correct? A. That is correct.

Q. Did you have any knowledge at all of the conditions of the plant in June? A. Of 1951?

Q. Do you have any knowledge at all of the conditions of the plant of Golden Grain plant in June of 1951? A. No, I have not.

Q. Or of condition of the plant on July 15th or prior to July 15 of 1951? [183] A. I have not.

Q. I think I said July 15th. I meant prior to July 18, 1951?

A. Prior to July, I have not, sir.

(Testimony of Fred Shallit.)

Q. Mr. Shallit, at the time you went out to the Golden Grain Manufacturing Company on July 18th, did you know that Mr. Dedomenico was not in town? A. Prior to making my inspection?

Q. Yes.

A. Not prior to entering the plant, no.

Q. When did you find out that Mr. Dedomenico was not there?

A. When I talked to the receptionist.

Q. That is what I am referring to. That was prior to the time you made your inspection, wasn't it?

A. I considered my inspection from the time I asked permission. That is part of my inspection procedure.

Q. And you knew that Mr. Dedomenico was not in town at that time?

A. I was told by the receptionist that he was not in town.

Q. And what instructions did you receive prior to the time you went out there to make the inspection, sir, and from whom did you receive those instructions?

A. I was instructed by my chief inspector, Douglas C. [184] Hanson, to make a factory inspection of the Golden Grain Macaroni Company.

Q. When did you receive those instructions, sir?

A. I can't state specifically. I will say it is within the week preceding July 18th and 19th.

Q. Mr. Shallit, I believe you started to testify as to the general description of the building out

(Testimony of Fred Shallit.)

there. Can you give us a little more detailed description of the building, the size of the top floor which is referred to in Exhibit No. 9?

A. The size of the top floor, of course, is the size of the bottom of the main and basement floor in that it——

Q. It is a square building?

A. Practically square, yes, sir.

Q. And about how big is the top floor?

A. I would say it was about ninety-five feet (95 ft.) by one hundred and five feet (105 ft.) as an estimate.

Q. Well, one hundred by a hundred (100 x 100) would be approximately right, too, wouldn't it?

A. That would be fairly right, yes.

Q. How high is the ceiling?

A. I would estimate—the ceiling on the second floor, sir?

Q. Yes.

A. I would estimate it to be probably about [185] seventeen feet (17 ft.)

* * *

Redirect Examination

By Mr. Sager:

Q. Showing you plaintiff's Exhibit 21, Mr. Sallit, were there moths present in that as you scooped it from whatever place you scooped it?

A. At the place where I obtained this sample there were eleven (11) live moths in the corner from which this flour or semolina was taken.

(Testimony of Fred Shallit.)

Q. And in taking the sample did you get some of those moths?

A. Yes, in taking the sample I observed that some of the moths did enter my sample.

Q. So you know that at least some of the moths were present at the time you took the sample?

A. Yes, sir, I do. [186]

* * *

Q. (Continuing): Counsel asked you what you considered as being insanitary or unsanitary procedures in the plant as you observed them. You answered something to the effect that the dumping of flour and semolina into the bin which had obvious evidence of insect infestation was an insanitary practice or condition. Now, would you consider the operation of this flour conveying system in the conditions you found it to be in, a sanitary practice?

A. No.

Mr. Yothers: I object to the question, your Honor, it is leading, that question.

The Court: Objection overruled.

Mr. Yothers: Not proper redirect.

Q. You may answer.

A. I would consider it to be an insanitary condition.

Q. On the basis of your experience in macaroni factory inspections, that is, inspections of this type of factory, are you able to say whether or not the conditions you found there on July 18th and 19th existed for some period prior to that date? [187]

A. I would say that they did.

(Testimony of Fred Shallit.)

Q. And can you say how much prior or——

A. It would be difficult to state how much was present at a prior date.

Q. Well, could that condition have developed over night?

A. No, if I may enlarge a little bit upon that. I testified I saw, I believe, approximately one hundred (100) moths or more in the plant which are adult moths. The adult moths, unless they were brought in as adult moths, could not have occurred over night. It would have taken a period of weeks for these adult moths to have become adult moths.

* * *

Recross-Examination

By Mr. Yothers:

Q. Now, the raw product which is brought in there contains adult moths, does it not, as the flour, as it comes in? A. I wouldn't state that, sir.

Q. You mean to say that it does not contain this, this flour that they get from the manufacturer does not contain moths?

A. I would say ordinarily in my examination of flour, [188] and I have examined many sacks of flour, a person does not find adult moths in an ordinary sack of flour.

Q. What would you find; you'd find larvae, pupae?

A. On the ordinary sanitary flour which is the principal flour which we find, there is no visual evi-

(Testimony of Fred Shallit.)

dence of insect infestation in the flour or on the sack.

Q. Are you certain of that?

A. From my experience sir, I am stating it.

Q. Did you inspect the flour that was out there?

A. I inspected flour sacks.

Q. Did you inspect the flour that they had out there?

A. You are talking about the flour or the sacks?

Q. The flour. A. That is not in the——

Q. The flour that they got in that they were going to be using for the manufacture of macaroni.

A. If I may explain, the flour is in hundred pound (100 lbs.) sacks approximately.

Q. I understand that.

A. I examined the outside, I believe it was. There were approximately quite a few hundred bags of flour stored in the basement. I examined the outside of those bags.

Q. But you didn't open up any of the bags or did you examine any of the bags that were opened ready to be used?

A. I obtained samples with Inspector Allen from some of [189] these, from a number of these flour bags.

Q. And it is your testimony now that there was no evidences of any moths at all in any of the flour that they were using?

A. In any of the raw material flour, sir, which was unopened and which I myself obtained a sample from, I saw no evidence of insect filth.

(Testimony of Fred Shallit.)

Q. What about those that were opened?

A. I can't testify to that. I did not observe any open sacks. I might state, I didn't examine the open sacks.

Q. And then you don't know whether or not any moths were brought in in the raw product, itself?

A. I can't state that conclusively.

Q. How does that flour, first of all, where is that flour produced, sir? A. Where is it produced?

Q. Yes.

A. The raw material, of course, will come from various mills throughout the country.

Q. And how is it sent or shipped to the Golden Grain Macaroni Company, for example?

A. Well, I wouldn't be able to tell you how it was sent or shipped.

Q. Well, would it come in by truck or by freight-car or boxcar? [190]

A. I have never seen any of them moving.

Q. Did you make an inspection of any of the boxcars? A. No; in this plant, sir?

Q. Yes. A. No, I didn't.

Q. Is the basis for your saying the conditions might have existed for some time solely because of the fact that you saw live moths?

A. I base it upon my experience and my information that the life cycle of the Mediterranean flour moth is approximately eight (8) weeks.

Q. But you don't know what the life cycle is in hot weather except that it is shortened and you don't know what the cycle is between the larva and

(Testimony of Fred Shallit.)

the pupa stage and the moth stage, is that correct?

A. I do not, that is correct.

Q. Well, a moth can develop from a larva, can it not, or from a pupa, can it not, in a matter of hours?

A. I am not an authority. I can not state that.

Q. The moth is simply the emergence of the insect from the pupa stage?

A. The developed insect.

Q. It is somewhat like the birth of a human being, one state of the period of gestation, one day it is born and the other day it is not, right? [191]

A. That is a rather rough comparison, sir.

Q. And these moths upon their emergence from the pupa stage start to fly around, don't they?

A. Again, I am not an authority.

Q. Well, that is one of the characteristics of the moth, is it not, it can fly?

A. I can say it probably does, but I am not stating that I know it does.

Q. Well, you base it upon your knowledge and reading about the Mediterranean flour moth, do you not?

A. The literature which I said states the adult moth emerges from the pupa after the adult stage has arrived.

Q. I think I asked you this question about the spray previously, but I'd like the Court's permission to reopen that question for one (1) or two (2) questions. What do they use this spray for? What is the purpose of the use of this spray?

(Testimony of Fred Shallit.)

A. Well, I can tell you what Mr. McDiarmid's conversation was.

Q. Well, no, I mean based upon your knowledge and experience as an inspector, what do the manufacturers make use of the spray for, what is its purpose?

A. The purpose of an insect spray is to kill insects.

Q. And the insect you are referring to is the [192] moth, is that correct?

A. In this particular case from my experience I would say that they would use this spray to kill this moth which was in this plant.

* * *

Q. You took samples, did you not of the elbow macaroni and the spaghetti on July 16th of 1951?

A. That is right, sir.

Q. And where did you get those?

A. From the West Coast Fast Freight Lines in Seattle.

Q. And what type of containers were they in?

A. They were in cardboard cases.

Q. Beg pardon? A. In cardboard cases.

Q. In cardboard cases? A. Yes.

Q. Were the packages themselves in cellophane packages?

A. No, it would be called a bulk pack.

Q. It was a bulk pack? A. That is right.

Q. Did you open up the cardboard pack?

A. Yes, I did.

Q. And did you make an inspection then of the bulk product contained therein?

A. I observed the product as I obtained my sample. [193]

(Testimony of Fred Shallit.)

Q. Did you see visible insects or insect fragments in it?

A. I saw nothing that looked like an insect fragment.

Q. That is as to both the macaroni and the spaghetti? A. Yes, sir.

Q. Do you know when that macaroni or spaghetti was produced?

A. At the time of my sampling I had no knowledge of it.

* * *

Further Redirect Examination

By Mr. Sager:

Q. Did you acquire any knowledge of it before?

A. I inquired as to the meaning of a certain code system later on, July 19th, and the code was explained to me at that time.

Q. From whom did you inquire?

A. From Mr. McDiarmid.

Q. Well then, on the basis of that, can you tell when that was produced?

* * *

A. On the sample 29-871 L, which is elbow macaroni, [194] on the case was coded No. 281. The explanation of that code is that it is the 28th week of 1951. The other case I saw no code on it, the other product.

Q. Mr. Shallit, you say you took some samples from the flour stock there at this plant on the 16th or 19th? A. Yes.

(Testimony of Fred Shallit.)

Q. Where was this flour stock kept in the plant?

A. Are you referring to the raw materials?

Q. Well, the flour and semolina which was in sacks waiting to be used in the manufacturing process?

A. It is stored in the northwest section of the basement.

Q. And how is it stored there, just in the flour sacks as—or in bins, or how?

A. They are in, most of them were hundred pound (100 lb.) sacks mostly, all of them stacked one on top of the other approximately ten (10) sacks high.

Q. Now, what sort of samples did you take from this flour there?

A. I first identified the flour as to its labeling and then from each lot of flour, each lot which I determined to be a lot by its specific labeling, I obtained a representative sample from certain bags throughout that lot.

Q. And how much, how many samples did you take then of that?

A. Well, in each case, of course, it will [195] vary. May I refer to—(Whereupon, the witness took a document from his pocket.) There were on a rough estimate, probably twenty-five (25), perhaps fifty (50) different samples obtained and in each case, of course, as an example, from eighty-nine (89) one hundred pound (100 lb.) bags I selected Durum Durella Semolina No. 1. I obtained

(Testimony of Fred Shallit.)

ten (10) samples of it by inserting a trier through the center of the bag.

I should state more specifically, that Inspector Allen and I worked on it together and then by allowing the flour to emerge from the trier into the container, the sample was thus obtained, after which the opening made by the trier was sealed.

Q. What do you call this gadget?

A. A trier. If I may describe it, it is an instrument approximately two or two and a half feet (2 ft. or 2½ ft.) long. It is made, I believe, of brass and it is semi-circular.

Q. Well, it is just something you punch in the sack so the flour or semolina will roll out?

A. Yes, that is right.

Q. Then you seal that hole afterwards, is that it? A. That is correct.

Q. Now, what did you do with these samples you took?

A. These samples were placed in cartons, taken back to the laboratory in Seattle, Washington. Excuse me. Taken back to my office in Seattle, Washington, together with [196] Inspector Allen's. A seal was placed on them and the sealed packages were submitted to the laboratory in Seattle.

Q. And were they given sample numbers?

A. An over-all sample number was given to the various exhibits which we have seen and to the flour samples which we took, and that number was INV 90-418 K.

Q. And there were how many of these samples

(Testimony of Fred Shallit.)

taken from the different lots of flour that you took?

A. From the flour itself?

Q. Yes, well, in semolina, whatever——

A. Flour and semolina. It would be a matter of counting them, sir, I could state briefly there are one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8) lots, and from each of these lots there are component parts.

Q. There are what?

A. Component parts. In other words, from the eighty-nine (89) one hundred pound (100 lb.) bags of selected durum durella flour, semolina, I took ten (10) samples from ten (10) different bags.

Q. I see.

A. The same thing applies to each of the other sample subs which I indicate as subs. [197]

* * *

Q. Well, would you step down, Mr. Shallit, and state whether or not these cartons and jars on the table here are the samples that you took from this flour?

A. Without going through each one individually, I will say yes.

* * *

Further Recross-Examination

By Mr. Yothers:

Q. These samples are the samples that you took from the raw product (indicating samples on table), which was stored in the basement there at the Golden Grain Macaroni plant, is that correct?

(Testimony of Fred Shallit.)

A. There was some storage on the second, top floor. Some samples were taken also from there.

Q. Without regard to where they were stored this represents samples of the raw flour which was being used in the manufacturing process down there at that time? A. Yes.

Q. Or were in storage to be used?

A. That is a presumption that I believe [198] is correct.

Mr. Yothers: Counsel, are you going to mark the entire set as one exhibit?

* * *

Mr. Yothers: That being the case, your Honor, we have no objection to that procedure. Just have the chemist's report of his analyses of these samples. We will stipulate they were taken from these samples. [199]

* * *

HORACE A. ALLEN

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name. A. Horace A. Allen.

Q. What is your occupation, Mr. Allen?

A. I am an inspector for the Federal Food and Drug Administration.

Q. And where are you stationed at the present time? A. At Spokane, Washington.

(Testimony of Horace A. Allen.)

Q. Where were you in July of 1951?

A. I was stationed here in Seattle.

Q. And did you assist with Mr. Shallit in the inspection of this plant, the Golden Grain Macaroni plant? A. I did.

Q. How long have you been with Food and Drug Administration?

A. About nine (9) years.

Q. And in what capacity during that time?

A. As an inspector.

Q. And what has been your experience with respect to this type of plant?

A. I have had considerable experience both in macaroni [200] manufacturing plants and in flour mills that manufacture flour, that type of thing.

Q. That is experience in your capacity as an inspector? A. Yes.

Q. In inspections?

A. Yes, as an inspector in inspecting flour mills and macaroni manufacturing.

Q. Were you present all the time during which Mr. Shallit was making an inspection of this plant on the 18th and 19th? Were you and he together all the time? A. Yes, we were.

Q. And likewise on the 31st? A. Yes.

Q. You took the pictures that have been offered here?

Mr. Yothers: Just a minute, your Honor. At this point I'd like to pose the objection previously given to the testimony of Mr. Shallit on the grounds stated at that time, that permission was not received

(Testimony of Horace A. Allen.)

from the owner, operator or custodian of the plant. Therefore, testimony of Mr. Shallit and Mr. Allen should not be permitted to be given at this time in this trial.

The Court: The objection will be overruled for same reasons I have heretofore stated. [201]

Q. (Continuing): With respect to that matter, Mr. Allen, were you present with Mr. Shallit in the office when you first went there, when he first went there and later when he came back?

A. Yes, we entered the plant together.

Q. And did you hear his testimony concerning his obtaining permission to inspect the plant?

A. Yes, I did.

Q. Would your testimony be the same?

A. It would be the same.

Q. With respect to your inspection with Mr. Shallit of these various parts of the plant and machines, would your testimony, did you hear his testimony?

A. I heard it all but just about a few minutes last evening at the end of the testimony. Other than that I heard all of it.

Q. And would your testimony be the same as his?

A. It would. [202]

* * *

Cross-Examination

By Mr. Yothers:

Q. Mr. Allen, were you here at the time I [203] cross-examined Mr. Shallit? A. Yes.

Q. Would your testimony and answers to ques-

(Testimony of Horace A. Allen.)

tions on cross-examination be substantially the same as his? A. Yes. [204]

* * *

ROBERT T. ELLIOTT

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name.

A. Robert T. Elliott.

Q. And you are now retired, are you Mr. Elliott?

A. Yes, sir.

Q. When did you retire?

A. July 31, 1951.

Q. Where do you live at the present time?

A. At the present time I live fifty (50) miles north of Seattle near the town of Silvana.

Q. And what was your occupation before you retired?

A. Chemist for the United States Food and Drug Administration.

Q. How long had you been employed in that capacity? A. Thirty-three (33) years.

Q. And what were your general duties as chemist with the Food and Drug Department?

A. For the most part, examination of foods. I had also during that time some inspection work, administrative work and various things, but for the most part it was examination of foods for violation of the Food and Drug Act. [205]

(Testimony of Robert T. Elliott.)

Q. What was your formal training?

A. I have a Bachelor of Science Degree in Chemistry from South Dakota State College, 1914.

Q. Any experience in the field of chemistry?

A. Not until 1918 when I entered the Food and Drug Administration.

Q. Since then your work has been, as you have explained? A. That is right.

Q. Examination of foods?

A. That is right.

Q. Mr. Elliott, have you made an analysis of samples submitted in this case? A. I have.

Q. And how did you receive those samples?

A. They were in a sealed condition bearing inspectors' seals, identified. The seals were intact.

Q. And what did you do with them?

A. I broke the seal, removed portions for analysis.

Q. Now, you identified them by sample number?

A. That is right. [206]

* * *

ROBERT T. ELLIOTT

having been previously sworn on oath, was called to resume the witness stand on behalf of the Plaintiff, and testified as follows:

Direct Examination

(Continued)

By Mr. Sager:

Q. Did you make an analysis of the sample identified as 30-340 L? A. Yes, sir.

(Testimony of Robert T. Elliott.)

Q. What did that sample consist of?

A. The sample consisted of twelve (12) twenty-four ounce (24 oz.) packages of cut macaroni in one sealed carton. Seals were identified by Inspector James A. Ford dated 7/16/51 and numbered 30-340 L.

Q. Now, what sort of an analysis did you make of that sample, Mr. Elliott?

A. I took six (6) packages from that case and examined eight ounces (8 oz.) from each of those six (6) packages.

Q. And will you tell us briefly the sort of process or analysis that you make of this sort of product?

A. I used the official method prescribed to us for use in alimentary pastes which consisted, briefly, of acid and alkali digestion of the material in the presence of water and heat, and the subsequent filtering of the digested material through a filter, and examination of the product [224] left on the filter under microscope.

Q. In the course of this digestive process what part of the macaroni or spaghetti or whatever it is, is filtered out or is separated?

A. The macaroni material, starches, proteins and so forth are digested into a liquid form which may be filtered through. Insect parts, solid material, rodent hairs, various other extraneous materials which are not proteins or starches, would not digest and would remain in substantially their original condition.

(Testimony of Robert T. Elliott.)

Q. And they are separated out by the filter?

A. That is right.

Q. Now then, you examine that visually?

A. We examine it under the microscope.

Q. What does your examination show with respect to this sample 30-340L?

A. In the six (6) eight ounces (8 oz.) subdivision (a) at the time, all of three pounds (3 lbs.), I found sixty-two (62) fragments of insect or larva, moth scales present in subs 2, 3, 5 and 6, that is four (4) of the six (6) subdivisions. And I found rodent hair fragments.

The Court: What is that?

The Witness: Rodent hair fragments in all subdivisions except one.

Q. Now with respect to sample 29-871 L? [225]

A. What is that number?

Q. 29-871 L. What did that sample consist of as you received it?

A. That was elbow macaroni. There were two (2) sealed cartons of eight (8) two and one-half pound (2½ lb.) subdivisions in paper bags. From the eight (8) subdivisions I took eight ounces (8 ozs.) from each of four (4) and made analyses of those by this same method that I described in the other sample.

Q. Then what did you find?

A. In the two pounds (2 lbs.) examined I found twenty-four (24) insect or larva fragments. I found in addition to that I found one (1) larva capsule

(Testimony of Robert T. Elliott.)

which is the part remaining from the head of a worm.

* * *

A. (Continuing): And I also found one (1) insect egg in that. I might state that in this method generally insect eggs are not recovered. Occasionally we do find them.

* * *

Q. They are digested with the other material?

A. Either that or so mutilated that they can't be recognized.

Q. Have you given us your entire findings [226] on that sample??

A. There were moth scales present in two (2) of these subdivisions, none noted in the other two (2).

Q. Can you identify the moth scale?

A. As to the variety of moth?

Q. Yes.

A. That would be difficult. I have made some study of that and I find that there is a variation in moth scales enough so that they might overlap and not be a definite identification of the various moths. These scales resemble those that I have seen as belonging to the Mediterranean flour moth.

Q. You had an opportunity to examine these exhibits, I think they are 21 through 26, at the time they were brought into the laboratory or shortly thereafter? A. Yes, I did.

Q. Have you seen them recently?

A. Looked at them the other day, yes, today.

(Testimony of Robert T. Elliott.)

Q. What can you say as to their condition now and the condition in which you saw them when they came into the laboratory?

A. I didn't open the jars, but looking through the glass they looked substantially the same as they did at that time.

Q. Did you observe moths in some of [227] these? A. Yes, I did.

Q. And what moth is that?

A. That is the Mediterranean flour moth.

Q. Have you completed your testimony on this sample 29-871 L? A. Yes.

Q. All right, tell us about your analysis of sample 29-872 L.

A. That was spaghetti. The sample consisted of one () sealed carton of two (2) two and one-half pound (2½ lbs.) portions in paper bags. The seals were identified 29-872 L, 7/16/51, Fred Shallit. I took eight ounces (8 ozs.) from each of the two (2) portions, of the two (2) parts of the sample and examined them in the manner I have previously described. In the first one I found eight (8) insect or larva fragments and in the second one I found six (6) insect or larva fragments.

Q. That was——

A. Moth scales were present in each section.

Q. What about sample 29-477 L now?

A. That was elbow macaroni sample consisted of one (1) sealed carton of twelve (12) fourteen ounce (14 oz.) packages. Identified 29-477 L, 7/26/51, Charles M. Chambers. I took one-half pound (½

(Testimony of Robert T. Elliott.)

lb.) from each of six (6) of those twelve (12) packages and examined it in the [228] manner I have described. In there I found a total of seventeen (17) insect or larva fragments, one small rodent hair, and found moth scales present in all portions.

Q. Now you are giving the total of insect fragments from the entire subdivisions?

A. From the entire three pounds (3 lbs.), yes.

Q. Were there some present in each subdivision?

A. Yes, ranged from one (1) to four (4).

Q. Is that also true of the prior sample 29-871 L?

A. Yes, there are insect fragments present in each one.

Q. Now with respect to 29-477 L, what——

A. That is the one I just finished.

Q. Excuse me, that is the one you just testified to? A. Yes, sir.

Q. I am behind one here; all right, the next one would be 29-478 L.

A. It consisted of one (1) sealed carton of twenty-four (24) fourteen ounce (14 oz.) packages. Seals were identified 29-478 L, 7/26/51, Charles M. Chambers. I opened six (6) of those packages and examined eight ounces (8 oz.) from each of the six (6). I found insect and larva fragments in all of the subdivisions, a total of seventy (70) in the three pounds (3 lbs.). [229]

* * *

A. (Continuing): In addition I found one (1) larva capsule in one (1) subdivision and one (1)

(Testimony of Robert T. Elliott.)

rodent hair in one (1) subdivision. The moth scales were present in all portions.

Q. Does the fact that you find fragments of larvae or insects in these examinations indicate that—does it have any significance as to whether the product as you received it, these insects were whole or whether they were in fragments then?

A. No, the fragments I found in these cases were imbedded in the macaroni, in the paste. I always make an examination of the packages that I receive to see whether there is any indication of gross contamination such as live insects or larvae outside of the material itself, either inside of the bag or out, but these were imbedded in the material and not visible as looking at the material in its original form.

Q. Well, what would your process of analysis, the mixing up of this macaroni and digestion of it, would that destroy the fragments that were present before you did that?

A. No, it wouldn't destroy them.

Q. Or would it break them down? A. No.

Q. Mr. Elliott, have you examined [230] macaroni products at other times during the course of your work for the Food and Drug Administration?

A. Yes, very many of them.

Q. Could you give us some estimate of how many?

A. Well, for the last ten (10) years of my employment I examined a great majority of the samples that came into the Seattle district. I probably

(Testimony of Robert T. Elliott.)

examined between two and three hundred (200 and 300) alimentary paste samples during that time, each sample of which might consist of anywhere from one (1) to a dozen (12) units, and each of these units would be examined separately so that——

Q. Now calling your attention to the sample jars and cartons on the table here that were referred to by Mr. Shallit, did you take an analysis of all of these?

A. I made an analysis of samples composited somewhat, some entire samples from single jars and others in which I took portions from some of the containers and composited them for single analysis.

Q. How many of these samples are there?

A. Sample 90-418 K consisted of four (4) sealed cartons. These cartons contained four (4) paper bags, five quart (5 qt.) paper cartons, twenty-four pint (24 pt.) paper cartons, nine (9) half pint (½ pt.) jars, sixteen (16) one pint (1 pt. jars, eleven (11) one quart (1 qt.) jars, making a total of sixty-nine (69) subdivisions. [231]

I went through that sample observing each one, but not analyzing all of them. Those that are obviously for exhibit purposes only——

* * *

A. (Continuing): ——obviously for exhibit purposes only and so noted in the inspector's memorandum were not analyzed. I observed them through the—without opening the jars. Some of the flour samples were analyzed by me.

Q. How many of these flour samples did you

(Testimony of Robert T. Elliott.)

analyze? I am speaking, Mr. Elliott, of the raw material samples, that is, the flour and semolina?

A. Subdivisions from 25 to 32, some of which consisted of more than one carton, were examined and that was the raw material in this sample.

Q. And how many of those samples did you actually analyze?

A. The actual determinations made, twelve (12).

Q. How did you make the—the same sort of analysis of that as you——

A. That was done by the flour method which is slightly different than the one I described, but substantially the same idea.

Q. And what did those findings show with respect to examination in those samples?

A. I found small amounts of filth in [232] some and in some no filth at all. In sub 25, that is the first one, I found in fifty grams (50 gm.) one (1) mite and one (1) larva which was not a moth larva because it was much too small.

* * *

The Witness: M-i-t-e, mite, and two millimeter (2 mm.) larva, which is too small to be a moth larva.

A. (Continuing): And no other filth. In subdivision 26 I took fifty grams (50 gm.) from each of two (2) parts of that sample, each part consisting of the five (5) subdivisions as submitted, that is, portions from ten (10) of those.

In the first fifty grams (50 gm.) I examined I found two (2) legs of the mite. In the second one I found no filth whatever.

(Testimony of Robert T. Elliott.)

Subdivision 27, I believe there was only one (1) portion of that. I examined fifty grams (50 gm.) and found one (1) rodent hair, one millimeter (1 mm.) long.

In subdivision 28 I made composites, each of which consisted of five (5) of the cartons, and made three (3) composites that would cover fifteen (15) cartons. In the fifty grams (50 gm.) examined under number 1, I found no filth; number 2, no filth; number 3, one (1) insect seta, [233] which is a little hair noted on insects and larvae.

In number 29 I examined two (2) fifty gram (50 gm.) portions, each being composites of three (3) subdivisions. In the first one I found one (1) insect fragment and in the second one I found no filth.

Subdivision 30, I composited four (4) of the cartons or parts of the sample into one (1) fifty gram (50 gm.) portion. I found no filth.

Subdivision 31, there was a composite made of four (4). One (1) sample of fifty grams (50 gm.) examined, no filth found.

Subdivision 32, flour composite of four (4) and fifty gram (50 gm.) portion examined, no filth found.

Q. The insect parts or whatever it was you found in these flour samples, were they—can you state whether or not that was the same insect from which you found fragments in the samples taken from the shipments, these sample numbers that you just previously testified to?

(Testimony of Robert T. Elliott.)

A. I didn't make a note of that. I wouldn't say for certain whether they were the same or not. I know that I didn't find moth evidence in the raw materials and I found moth evidence in the finished product. There may have been an occasional fragment in the finished product which could be attributed to the raw material, but certainly no moth material was found in the raw product [234] examined.

Q. Now, when you say moth material, do you include the larva and pupa?

A. Yes, all larvae, pupae or adult moths.

* * *

Cross-Examination

My Mr. Yothers:

Q. Mr. Elliott, when did you make the analysis of sample No. 30-340 L? Do you know the date of the analysis?

A. I received the sample on the 23rd of June and I reported it on the 24th.

Q. Where did you get the sample from, Mr. Elliott?

A. I got it from the Chief Chemist of the Food and Drug Administration.

Q. And what was the condition of the sample at the time you received it, sir?

A. It was sealed, in a sealed carton. [235] Is that what you mean?

Q. Yes. And what did that carton contain, sir?

A. I beg pardon?

(Testimony of Robert T. Elliott.)

Q. What did that carton contain?

A. It contained twelve (12) twenty-four ounce (24 oz.) packages of cut macaroni, cellophane bags.

Q. Now, at the time you received the sample 30-340 L, Mr. Elliott, did you examine the contents visually? A. Yes.

Q. Did you make that examination prior to the time that you ran the test? A. Yes.

Q. Did you, as a result of that examination, sir, determine if there was any filth?

A. I didn't find any evidence of filth on the outside of the packages or on the material as I took it out to examine it chemically.

Q. No evidence of any filth on the package or on the contents themselves? A. No, sir.

Q. By the way, Mr. Elliott, filth is rather an abstract term. What do you mean when you say filth?

A. Evidence of insect or rodent activity is the general term, decomposition, mold and things of that sort are also termed filth in some cases, particularly decomposition. [236]

Q. Was there any mold or decomposition found as the result of either your visual examination or of your microscopic examination of this sample?

A. No, I found none.

Q. Was there any evidence of mold or decomposition as a result of your visual or microscopic examination of any of the samples?

A. No, there was not.

Q. The only evidence that you had then, as I understand, sir, is the evidence of insect activity to which you had previously testified?

(Testimony of Robert T. Elliott.)

A. That is right.

Q. And based upon that, in your opinion, is the food product of these samples contaminated by that filth? A. That is right.

Q. Now, how large are these insect fragments?

A. Well, they vary in size. Most of them are so broken up in the process of manufacturing the product that they are microscopic in size. Some of them could be seen with the naked eye, but you must take a microscope to properly identify them. I mentioned in one sample that I found a capsule. That is the head covering of a larva. That would be large enough so that you could recognize it with the naked eye.

Q. Well, can you give some indication how large that [237] was, the size it would be?

A. Oh, capsule will be from a thirty-second to a sixteenth of an inch (1/32″ to 1/16″) in diameter.

Q. A thirty-second to a sixteenth of an inch (1/32″ to 1/16″) in diameter?

A. Yes, depending on the size of the larva.

Q. What power microscope did you use to determine that?

A. It is called a low powered microscope, about forty (40) diameters.

Q. Magnifying forty (40) times?

A. That is right.

Q. Now, can you describe the characteristic of the appearance of a moth scale, sir?

A. A moth scale is sort of a filament-like object that comes almost to a point at one end, and at the

(Testimony of Robert T. Elliott.)

other end it is sort of feathered. It is hard to describe it without drawing a picture of it, but it is fan-shape to a slight degree, not wide open, but narrow and it——

Q. How large is it?

A. Not over a millimeter (1 mm.) or two (2 mm.), which would be not over a tenth or a sixteenth of an inch (1/10″ or 1/16″) long, any of them.

Q. Are they similar in appearance to wheat hull?

A. Oh, no. [238]

Q. They are not? A. No.

Q. Can you describe a wheat hull, sir?

A. A wheat hull is a piece of the outside covering of the wheat and it has its definite characteristics. There is no resemblance whatever between a piece of wheat hull and a moth scale. Moth scale is grey in color under the microscope and the wheat hull is usually tan or brown.

Q. Mr. Elliott, do you use a mesh or filter to filter these, this matter out?

A. Yes, it is very fine.

Q. How fine is that mesh?

A. In some instances a paper is used which is so fine that nothing at all will go through it except a liquid. Other times we use a very fine mesh bolting cloth, one hundred to a hundred and twenty (100 to 120) per inch.

Q. It is so fine, is it not that it is opaque, you can't see through it?

A. Well it is translucent, yes.

(Testimony of Robert T. Elliott.)

Q. And would a twenty (20) mesh screen screen out these fine particles, sir?

A. Not—some of them it would, some wouldn't. Some of those fragments were large enough to be caught in a twenty (20) mesh screen. Most of them that are broken up into the paste itself, would not—would go through a twenty (20) mesh [239] screen.

Q. Would the presence of these insect fragments, such as you found in the samples that you examined, sir, would they be injurious to health after the product was cooked and ready for consumption?

Mr. Sager: I will object to that, your Honor, because it is immaterial. The question is not whether the product is injurious to health. It is wholly immaterial.

The Court: Objection sustained.

Mr. Yothers: I don't wish to appear to argue with the Court, your Honor, on the matter of the Court's ruling, but the purpose of the question, your Honor, was it goes to the question of whether or not the fragments as found were filthy and I think the word "filthy" is not defined under the statute as something which is, would be considered in its ordinary meaning, and certainly if a matter is not injurious to health is one of the factors that the Court has, as trier of the facts, to take into consideration in making a determination as to whether these things are filthy or not.

The Court: The Court has ruled, counsel.

Q. What was the size of the sample used by

(Testimony of Robert T. Elliott.)

you in [240] making your analysis in 30-340 L, Mr. Elliott?

A. I used a half pound (½ lb.) in each portion that I analyzed.

Q. You used one-half pound (½ lb.) of each portion? A. Yes, sir.

Q. How many grams would that be?

A. Two hundred twenty-five (225).

Q. I understood you to say you used three pounds (3 lbs.). That is the total?

A. Total of six (6) subdivisions, six (6) portions.

Q. Oh, I see, that would be a total then of six (6) times two hundred twenty-five grams (225 gm.), is that correct? A. That is right.

Q. Thirteen hundred and fifty grams (1350 gm.) if my arithmetic is correct? A. That is right.

Q. So your total finding as to that particular sample then, you stated, was in the sum total of sixty-two (62) fragments, is that right?

A. That is right.

Q. Can you break that down as to the individual amount in each sample, sir?

A. Yes, I have it here.

Q. As to sample number 1, how did you designate that? [241]

A. I will call it portion number 1.

Q. Portion 1 was five (5)? Portion 2 was nine (9)?

A. Portion 2 is nine (9). Portion 1 is five (5).

Q. Yes?

(Testimony of Robert T. Elliott.)

A. Portion 3 is ten (10). Portion 4 was sixteen (16). Portion 5 was fourteen (14). Portion 6 was eight (8).

Q. Did you make slides, sir, of these samples that you took? A. No, I did not.

Q. Microscopic slides were not made?

A. No.

Q. Why didn't you make slides, sir?

A. The material is on paper and we don't as a rule try to keep those because they wouldn't stay in the condition they are. They dry out and are lost. We can't cover them with cover glasses because of the shape of the material. Would cause it to break and probably break the fragments and we just don't attempt to keep those things.

Q. Now sir, referring to sample 29-871 L, that is the elbow macaroni? A. Yes, sir.

Q. And what—how many samples did you take of that?

A. That sample consisted of nine (9) bags of bulk macaroni about two and one-half pounds (2½ lbs.) each, and I analyzed a half pound (½ lb.) from each of four (4) [242] of those bags.

Q. For a total of two pounds (2 lbs.) then?

A. That is right.

Q. That would be four hundred fifty grams (450 gm.)?

A. Nine hundred grams (900 gm.), wouldn't it?

Q. Nine hundred grams (900 gm.). And you broke that down into portions, did you?

A. Four (4), yes.

(Testimony of Robert T. Elliott.)

Q. Four (4) portions. Would you give us the results of the portions?

A. Number 1 seven (7) fragments.

Q. Seven (7)?

A. Seven (7). Number 2 contained nine (9). Number 3 contained four (4). Number 4 contained four (4). In addition to that there was one (1) larva capsule in number 3.

Q. One (1) larva capsule?

A. One (1) insect egg also in number 3.

Q. And as to sample 29-872 L, would you break that down for us also, please?

A. I examined two (2) eight ounce (8 oz.) portions from that making a total of one pound (1 lb.) or four hundred fifty grams (450 gm.). In the first portion I found eight (8) segments or larva fragments and in the second one I found six (6) moth scales present in both portions. [243]

Q. How many moth scales, sir?

A. I didn't count them.

Q. Did you make any estimate as to the number or——

A. No, they are—usually when we note that moth scales are there they must be in a substantial number or we wouldn't even mention it because a moth scale is something that can be detected even if a moth flies over, but when there are enough scales in there to indicate the product has come in direct contact with a moth, then there will be enough scales there to——

Q. How many would that be, sir?

(Testimony of Robert T. Elliott.)

A. Oh, fifty (50) or more, probably.

Q. In each sample?

A. No, I won't say there were that many in each sample, but more than two (2) or three (3) at least.

Q. But you don't know how many are in each of the samples? A. No.

Q. This test that you have just explained now, who set the standard on that, sir?

A. You mean who?

Q. Who advised you the standard as to whether or not to make the report of the moth scale being present or not being present? Is that part of the regular standard test?

A. No, it is more or less of my own experience in the [244] vast number of samples I have examined. When you find one (1) or two (2) moth scales where there is no evidence of moths being present—if you don't find moth fragments or moth larvae fragments, you might even then find one (1) or two (2) moth scales but when they are in substantial numbers in connection with moth fragments, you assume that those are substantial enough to mention.

Q. That is an assumption that you made in this case, is it? A. That is right.

Q. Now, as to the next, 29-477 L, will you break that down for us, please?

A. I took eight ounces (8 oz.) from each of six (6) packages, a total of three pounds (3 lbs.). The

(Testimony of Robert T. Elliott.)

first one I got one (1) fragment, the second four (4), the third one two (2).

Q. Just a minute. First one was what?

A. One (1). Second was four (4). Third was two (2). Fourth was three (3). Fifth was four (4), and the sixth was two (2). Also, I found moth scales in all portions examined.

Q. And as to 29-478 L?

A. I examined six (6) half pound (½ lb.) portions of that. Portion number 1 I got eighteen (18) insect larva fragments. Number 2, fourteen (14). Number 3, four (4). [245] Number 4, twenty-two (22). Number 5, seven (7). Number 6, five (5), a total of seventy (70). I found one (1) larva capsule in number 4 in which there were twenty-two (22) fragments. Moth scales were present in all portions.

Q. Is the test that you used, sir, the one that is authorized and approved by the Association of Agricultural Chemists? A. Yes, sir.

Q. And is that also the same thing true of the flour sample test analysis that you ran on that?

A. Yes.

Q. Of the flour sample tests that you ran, were they? A. What?

Q. Semolina test?

A. I tested for filth in both semolina and flour, yes.

Q. Can you give us the citation of authority for this test, Official and Tentative Methods of Analysis of the Association of Official Agricultural Chem-

(Testimony of Robert T. Elliott.)

ists—strike that. Perhaps I can ask you this question. Was that the same test that is set forth in the sixth edition of the—is that the test that is set forth in the sixth edition of the Official and Tentative Methods of Analysis of the Association of Official Agricultural Chemists, page 782, paragraph [246] 42.37? A. Page?

Q. Pages 781 and 782,

A. What is that volume again?

Q. Sixth edition.

A. I have the seventh edition. I have the sixth edition (procuring it). What was that paragraph again please?

Q. 42.37 and 42.30, two (2) tests.

A. That is for alimentary paste.

Q. Beg pardon? A. 42.30?

Q. Yes. A. Yes, that is the one.

Q. That is the test for flour sample, is that correct? A. Yes.

Q. Is that the same test that you used?

A. That is right.

Q. And the test that you used on the samples of macaroni products, is that the test, paragraph 42.37, the same book?

A. Yes, that refers you back to 42.28 which is the same test essentially. Slightly different in wording in the two volumes. I used this later volume in my directions.

Q. Different in wording but the methods are the same? [247] A. Not materially, no.

(Testimony of Robert T. Elliott.)

Q. In making your test, Mr. Elliott, did you weigh the original sample?

A. You mean first before I started?

Q. Yes. A. I always weigh.

Q. Did you weigh the individual portions?

A. Yes.

Q. And did you make a record of those weights of the individual portions?

A. Yes. Do you mean the portions I analyzed or the whole bag?

Q. No, the portions you analyzed?

A. Yes, I weighed out exactly the ounces in every case.

Q. In each case there were eight ounces (8 oz.) to a portion? A. That is right.

Q. Did you make an attempt to weigh the insect fragments that you observed as a result of your analysis? A. No, sir.

Q. Can you give us an approximation, sir, of the relationship as to weight the insect fragments had to the total sample?

A. No, I don't believe I could.

Q. It would be extremely small? [248]

A. Yes, extremely small.

Q. Almost infinitesimal?

A. I wouldn't answer that.

Q. Can you give—did you make any quantitative analysis at all of the product?

A. Only as to the number of fragments that I found.

Q. And can you give us any idea of the relation-

(Testimony of Robert T. Elliott.)

ship, the volume of insect fragments to the total volume of the sample?

A. It would be very small too.

Q. Would that—would the insect fragments that you found in sample 30-340, sir, render that unfit for food or consumption?

A. That is not my province to determine.

Q. Well, do you have an opinion on it, sir?

A. Yes, sir.

Q. Would it render it unfit?

A. I would think so.

Q. And what do you base that on, sir?

A. Because it is a filthy product.

Q. Let's take portion number 1 of sample 30-340 with five (5) insect fragments in that one (1) eight ounce (8 oz.) portion, would that render that unfit for food, in your opinion?

A. I wouldn't want to eat it if I knew they were [249] there. I don't think they would hurt me if I eat it not knowing it was there, but knowing it was there I wouldn't want to eat it.

Q. Well, would your answer be substantially the same as to each one of the portions of each of the samples?

A. I think so. I'd consider the sample as a whole, not one portion alone.

Q. Well, take portion number 1, 29-477, one (1) fragment, would your answer be the same as to that?

A. I wouldn't consider it fit to eat, not because of that one (1) fragment, but because of the asso-

(Testimony of Robert T. Elliott.)

ciation with other portions of the same sample and from the same course.

Q. In that sample there was no portion that had more than four (4), is that correct?

A. Yes, I believe that is right.

Q. Would your answer be the same under those circumstances?

A. Not from the number of insect fragments alone, no.

Q. Mr. Elliott, check me if I am wrong on this. As I understand the tests you made on the samples of the finished product, the macaroni and spaghetti were on a basis of two hundred twenty-five grams (225 gm.) in each portion? A. That is right.

Q. And the tests that you made on the flour were on [250] the basis of fifty grams (50 gm.) per portion? A. That is right.

Q. Doesn't this test provide that the testing of flour, that is, the analysis as set forth in the book referred to previously, provide that the test should be made on the basis of one hundred gram (100 gm.) samples?

A. 42.30 says weigh fifty grams (50 gm.) of flour into a two hundred fifty (250) beaker.

Q. Well, perhaps you can answer this question. Would it make any difference if you used a fifty or one hundred gram (50 gm. or 100 gm.)——

A. Well, the test is difficult to make with too much of a starchy material present. You have to confine it to a small enough amount so you can handle that during the process of digestion and so

(Testimony of Robert T. Elliott.)

forth, and a large amount of flour makes it very difficult to get the fragments in condition where you can find them.

Q. And is the same thing true of semolina?

A. Well, semolina, by using huge volumes of the material that we use to digest it, you could use—I could use more than a half pound (½ lb.), but a half pound (½ lb.) is a very convenient size to use and is considered enough.

Q. And a half pound (½ lb.) is about a hundred grams (100 gm.)?

A. Two hundred twenty-five grams [251] (225 gm.).

Q. That is the reason why you used that portion in the case of the finished product?

A. Well our experience with these methods prescribed which we use all the time, we can do it economically and efficiently and the eight ounces (8 oz.) is found to be the best amount to use, or two hundred twenty-five grams (225 gm.). You understand, these methods have been tried by a large number of chemists and they are arrived at through a large number of determinations and that is the end result.

Q. Mr. Elliott, based upon your experience and the number of years as a chemist for the Food and Drug Administration, I think you indicated that you had made examination of several samples of macaroni and macaroni products. In your opinion, sir, is it possible for macaroni products—strike that. Is it possible for the raw material, flour, to

(Testimony of Robert T. Elliott.)

be completely one hundred per cent (100%) free from any infestation whatsoever or evidence of insect activity including moth scale, larva or egg in the practical application to the production of macaroni and macaroni products?

A. I might answer that by saying I have examined a great many samples both of the flour, semolina and the finished products and lots of them, I couldn't say offhand what proportion, but lots of them have been entirely free from filth.

Q. Entirely free from any insect activity or evidence [252] of insect activity such as moths or moth scales?

A. Not discovered by these same methods used.

* * *

Redirect Examination

By Mr. Sager:

Q. These publications you have been referring to, these books, Mr. Elliott, are they, do they have any relationship to this Association of Agricultural Chemists you mentioned?

A. Yes, they are the methods arrived at by this Association and published as their methods.

* * *

Q. Were you a member of that Association?

A. Ex officio food analyst, I was, yes.

Q. During your work with the Food and Drug Administration? A. That is right.

* * *

Mr. Sager: I understand counsel will stipulate

(Testimony of Robert T. Elliott.)

with respect to these codes. On Count 2, sample 30-340 L the code number was 251. On Count 3, sample 29-871 L the code number was 281. That with respect to Count 5, sample 29-477 L, the [253] code number was 301, and that same code number applied to sample 29-478 L with respect to Count 6.

And additionally, I understand counsel will stipulate that those code numbers, the first two (2) digits indicate the week of the year. In other words, 281, that would be the twenty-eighth week, and the third digit means 1951; and that the code indicates the product was manufactured during that week.

Mr. Yothers: That is correct, your Honor.

Mr. Sager: So stipulated.

Mr. Yothers: So stipulated.

The Court: The Court will accept that stipulation.

Mr. Sager: Now the Government offers in evidence the records of this Court in Cause No. 47116. I understand it is stipulated that the defendants named in this Cause 47116 are the same defendants now on trial.

Mr. Yothers: That is correct.

The Court: The Court accepts that stipulation. Is that stipulated to or are you offering it in evidence?

Mr. Sager: I offered the file in evidence. [254]

* * *

The Court: The indictment charges that on March 14, 1947, said Golden Grain Macaroni Com-

(Testimony of Robert T. Elliott.)

pany, Inc., a corporation, and Paskey Dedomenico, an individual, were convicted in this court of violation of the Federal Food, Drug and Cosmetic Act, Docket No. 47116, which conviction had become final before the violation heretofore alleged was committed. The acceptance of this file in evidence is merely proof of that allegation in the [255] indictment.

* * *

The Court: If this case were to be tried before a jury I would handle it entirely different, so for this purpose, for the purpose which I have already indicated, I think it is properly admissible in evidence and I will so admit it.

Mr. Yothers: For that purpose there is no objection, your Honor.

(Plaintiff's Exhibit No. 27 marked for identification and admitted in evidence.)

Mr. Sager: The Government rests, your Honor.

Mr. Yothers: Your Honor, at this time the defendants move in the proper motion for an acquittal, this not being a trial before a jury. We challenge sufficiency of the evidence. I'd like to take up as to Paskey Dedomenico first and then as to the defendant Golden Grain Macaroni, separately. [256]

* * *

The Court: I don't care to hear any argument on what constitutes filth. Filth is to be taken in its ordinary accepted term. Incidentally, the case of United States vs. Lazere, 56 Fed. Supp., 730

(Testimony of Robert T. Elliott.)

is a case involving bakery goods. They found rodent hairs and insect fragments. The Court held that they constituted a filthy substance. Now, filth is filth. You don't have to go into any refinements about analyzing what constitutes filth to me. You will abandon that portion of your argument. [262]

* * *

The Court: It wouldn't have existed there at all if proper precautions had been taken. [264]

* * *

The Court: This is to be interpreted as a motion for acquittal?

Mr. Yothers: Yes.

The Court: Both motions will be denied as to the corporation defendant and as to the individual defendant. You may proceed. [276]

JACK KENNEDY McDIARMID

being first duly sworn on oath, was called as a witness on behalf of the Defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. Would you state your full name, please?
A. Jack Kennedy McDiarmid.
Q. How do you spell the last name?
A. M-c-D-i-a-r-m-i-d.
Q. Where do you live, Mr. McDiarmid?
A. 1027 South 101st, Seattle.

(Testimony of Jack Kennedy McDiarmid.)

Q. And how long have you resided there, sir?

A. Five (5) years.

Q. By whom are you employed?

A. Golden Grain Macaroni Company.

Q. For how long?

A. Approximately six (6) years.

Q. And in what capacity, sir?

A. Sales manager.

Q. In what capacity were you employed in May and June and July of 1951?

A. As sales manager.

Q. And as sales manager what are your duties and responsibilities, sir?

A. I have charge of all sales and anything pertaining [277] to sales.

Q. Do you have any duties with relation to the operation of the business other than the sales?

A. No, I haven't.

Q. Do you have any of your duties with relationship to the production of any of the food products that are produced out there?

A. No, I have not.

Q. In the absence of Mr. Dedomenico are you in charge of the building, of production?

A. No, I am not.

Q. Who is?

A. Mr. Mulvaney has charge of the production.

Q. Is that same—was that true in June and July of 1951? A. Yes, it was.

Q. Was Mr. Dedomenico present in July the 18th, 19th of 1951? A. No, he wasn't.

(Testimony of Jack Kennedy McDiarmid.)

Q. Where was he, sir?

A. He was in San Francisco.

Q. And when had he left?

A. To the best of my knowledge he had left about two weeks previous to that. I don't remember the date.

Q. Do you recall the occasion when Mr. Shallit and [278] Mr. Allen came out to the Golden Grain Macaroni plant? A. I do.

Q. On July 18th? A. Yes.

Q. Can you relate what your conversation with them was, sir?

A. Well, I came into the plant at about eight-thirty and the two (2) inspectors were there, and they asked permission to inspect the plant. And I saw no reason at all to refuse them, so I told them to go ahead.

Q. Did you have any authority? Were you authorized by Mr. Dedomenico, sir, to permit anyone to go into the plant?

A. No, I was not authorized by him.

Q. And at that time who was the custodian of the plant, sir?

A. Well, Mr. Mulvaney has always had charge of the production.

Q. Well, was he in charge of the building and the warehouse and plant?

A. Yes, he had been in charge of the plant and the warehouse.

* * *

(Testimony of Jack Kennedy McDiarmid.)

Cross-Examination

By Mr. Sager: [279]

Q. Mr. McDiarmid, when you got down to the plant there on whatever day the inspectors were there, you say they were there at the time when you got there? A. Yes, they were there.

Q. When you first walked in?

A. Yes, they were in another office.

Q. And did you see anybody in the plant before you saw them? A. Just our office girl.

Q. Did she tell you they were waiting to see you? A. Yes, she did.

Q. Did she tell you they wanted to inspect the plant?

A. I don't recall whether they said that or not. She said, "The inspectors from the Pure Food and Drug are here."

Q. Waiting to see you? A. Yes.

Q. Did she tell you that she had—did she tell you what they wanted to do?

A. No, she didn't. That is the only conversation I believe she had with me.

Q. You went then immediately to see them?

A. I came out immediately, yes.

Q. What was that girl's name, Mr. McDiarmid?

A. Her name is Shoemaker.

Q. Is she still with you? [280] A. Yes.

Q. Still receptionist? A. Yes.

Q. Did you respond to this notice or citation

(Testimony of Jack Kennedy McDiarmid.)

that was issued by the Food and Drug Administration? A. Yes.

Q. And went with Mr. Dedomenico to the office of Mr. Monfore? A. Yes, I did.

Q. During the course of that interview you told Mr. Monfore that in the absence of Mr. Dedomenico you were in charge, did you not?

A. No, I don't believe I said I was in charge. I believe I told him I was the manager.

Q. The manager of the plant?

A. No, no, that is wrong. I didn't say the plant manager.

Q. What did you—what were you the manager of? A. Sales manager.

Q. You already told them you were sales manager, didn't you? A. I probably did.

Q. You were present when he dictated this report to his stenographer?

A. I don't know. He was taking notes. I don't recall [281] whether he was dictating or not.

Q. Don't you recall that after the conversation, after he had taken notes that he had called in the stenographer and dictated to her and he asked you gentlemen to observe what he dictated, and when he concluded he asked you if what he had dictated wasn't substantially what had happened, what had been said?

A. It has been some time ago. I don't recall him dictating to his stenographer. I remember him asking the questions.

Q. Don't you recall saying this at the conclusion:

(Testimony of Jack Kennedy McDiarmid.)

He asked, "Does the proceeding or record of hearing as I have dictated it represent a true report of the hearing?" Do you recall that?

A. No, I don't.

Q. Didn't you tell—in fact, didn't you tell Mr. Monfore there that you are the sales manager of the Seattle plant and that you act as manager in the absence of Mr. Dedomenico?

A. Well, I act as sales manager in the absence of Mr. Dedomenico, but not as production manager.

Q. You act as sales manager when he is present, don't you?

A. Yes, and when he is absent too.

Q. So there would be no purpose in your drawing that [282] distinction, would there?

Mr. Yothers: I object to this. It is argumentative, your Honor.

The Court: I am very much interested in hearing his explanation of that, overruled.

A. Well, the only way I can explain it, is I have nothing to do with the production end of the plant whatsoever and never have had.

Q. But you are in charge?

A. But I have everything to do with sales and the organization and anything that pertains to sales I have jurisdiction over. For instance, if an order doesn't go out on time or something of that nature, I would go into the shipping department and find out what the trouble was. In as far as that there, my authority ends. I have nothing whatsoever to do with the production of the plant, the manufacturing

(Testimony of Jack Kennedy McDiarmid.)

of the goods or the checking in of the incoming freight or anything of that type.

Q. I am directing my questions to you, Mr. McDiarmid, as to what you said at this hearing before Mr. Monfore.

Mr. Yothers: If it please the Court, he has already said that he did not say this. This Exhibit No. 8 is what Mr. Monfore says is his record.

The Court: He hasn't said yet. He didn't [283] say that. That is what I am trying to find out, why he draws a distinction, calling himself sales manager one time and then saying he acts in the capacity of manager in the absence of Mr. Dedomenico. That is what I want to find out. Did you say that or didn't you?

The Witness: If I said that I misspoke myself. I certainly didn't mean to infer that I was the manager of the plant.

The Court: Well, did you or did you not say it was your best recollection?

The Witness: My best recollection says that I didn't say it.

Q. You don't recall this being dictated either, in your presence, is that true?

A. No, I don't recall the details of it at all.

Q. I am not asking about the details. Do you recall the matter being dictated to a stenographer in your presence?

A. I don't recall that either.

Q. You don't recall the stenographer being present? A. No.

(Testimony of Jack Kennedy McDiarmid.)

Q. Who is the over-all manager or one in charge of the Seattle plant? A. Mr. Dedomenico.

Q. This company also has a plant in California, isn't [284] that true?

A. Well, I wouldn't know that.

Q. You don't know that?

A. Mr. Dedomenico is president of the corporation.

* * *

Q. I asked you if—doesn't the company also have a plant in California?

A. Oh, I am sorry. I misunderstood you. They certainly do.

Q. That is where Mr. Dedomenico was on this occasion? A. Yes.

Q. Does he go down there frequently?

A. Quite frequently, yes.

Q. Now, who is in charge of the general operation when he is away?

A. Well, there is three (3) departments that would be in charge. It would be the manufacturing department which is headed by Mr. Mulvaney, and the bookkeeping department and the sales department and they are all run by individuals.

Q. And isn't there anybody over the three heads of those departments, anybody? [285]

A. Other than Mr. Dedomenico, no.

Q. So that when he goes each department is on its own and wholly independent of any superior?

A. That is right. If we want him we can always get in touch with him by phone usually.

(Testimony of Jack Kennedy McDiarmid.)

Q. When the agents talked to you on the occasion of this inspection they told you that they had been advised that Mr. Dedomenico was absent?

A. Yes, I believe they did.

Q. Or at least you had some conversation there on the subject to the effect that he was absent?

A. They knew he was absent when I first talked to them.

Q. Did they tell you that they had sought permission from Mr. Mulvaney?

A. They did not.

Q. Or that the girl did? A. No.

Q. They asked your permission and you granted it? A. They did.

Q. You assumed the responsibility to grant their request to make the inspection?

A. I didn't know otherwise. I gave them permission. I presumed they had the right to enter the plant.

The Court: Why didn't you say go and see [286] Mr. Mulvaney? You testified that he was in charge of production?

The Witness: Well, I presumed that they could enter the plant without even seeing anybody, to tell you the truth. I thought they could go right ahead and make their inspection.

Q. Didn't they ask you for permission?

A. They did.

Q. You knew they had been waiting around there for some period of time, didn't you?

(Testimony of Jack Kennedy McDiarmid.)

A. Yes, they had been, about a half hour, that is, I did find that out.

Q. Waiting to get your permission?

A. Yes.

* * *

Redirect Examination

By Mr. Yothers:

Q. Did you—did the inspectors at any time ask you for permission to inspect the plant at some other time? A. Not to my knowledge.

Q. Do you know whether or not they contacted Mr. Mulvaney? A. I didn't know.

Q. Do you know whether or not on that date they [287] contacted Mr. Mulvaney?

A. I didn't know it until the testimony yesterday that they contacted Mr. Mulvaney.

Q. Well, when they contacted you, Mr. McDiarmid, on July 18, 1951, can you tell us what their conversation was? Did they say we want permission, or did they say we came to inspect the plant, or what was it? What did they say to you?

A. No, they asked permission to inspect the plant.

Q. And you told them to go ahead?

A. I told them to go ahead.

Q. I take it that you didn't ask them if they had asked Mr. Dedomenico or Mr. Mulvaney?

A. No, I didn't. [288]

* * *

ALLEN T. BUTLER

being first duly sworn on oath, was called as a witness on behalf of the Defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. State your full name.

A. Allen T. Butler.

Q. And where do you reside, Mr. Butler?

A. 528 Lakeside Avenue, South.

Q. And here in the city of Seattle?

A. Seattle.

Q. What is your profession, sir?

A. Chief General Sanitation in Seattle, King County Health Department.

A. And were you acting in such capacity in 1951? A. Yes, sir.

Q. Is it a part of your duty, sir, to keep track and charge of the records of inspections that are made by your inspectors? A. Yes, sir.

Q. And do you have the copy of the record of inspections that were made by your inspectors of the Golden Grain Macaroni Manufacturing Company in 1951? A. I have.

The Clerk: Defendant's Exhibit A-1 for [289] identification.

Q. Handing you what has been marked as Defendant's Exhibit A-1 for identification, I will ask you if you can identify that, sir? A. Yes.

Q. What is it?

A. It is a record of three (3) separate inspec-

(Testimony of Allen T. Butler.)

tions made of the Golden Grain Macaroni Company's plant at 4715 6th Avenue South, by the District Sanitarian.

Q. And can you give us—are those part of the official records of your office? A. They are.

Q. Kept under your supervision and direction?

A. That is right.

Mr. Yothers: I offer it in evidence.

Mr. Sager: May I inquire on voir dire?

The Court: You may.

Mr. Sager: I assume, Mr. Butler, that the name signed at the bottom of these, in one instance with Tabor, is it?

The Witness: Forbes.

Mr. Sager: And the other, Forschmiedt, that they were the ones that made the inspections?

The Witness: That is correct.

Mr. Sager: You didn't make the [290] inspections?

The Witness: No, I didn't make the inspections.

Mr. Sager: You have no knowledge of the conditions of the factory yourself?

The Witness: No, sir.

Mr. Sager: I will object to the exhibit, your Honor on the ground it is hearsay and object further to the second and third sheets on the ground that they are dated in 1952 and would be too far removed from the period here involved.

The Court: Is this record kept in your regular course of business, sir?

The Witness: Yes.

(Testimony of Allen T. Butler.)

The Court: I don't think it adds much to the situation. It doesn't help the Court very much but I will admit it in evidence.

(Defendants' Exhibit No. A-1 marked for identification and admitted in evidence.)

Q. One other question relative to this exhibit, Mr. Butler. Mr. Forschmiedt who made the examination on May of 1951, is he in your employ at the present time? A. No.

Q. Do you know where he is?

A. He is still in the city. I don't know where he is employed. [291]

* * *

JOSEPH W. MULVANEY

being first duly sworn on oath, was called as a witness on behalf of the Defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. Please state your full name.

A. Joseph W. Mulvaney.

Q. Where do you live, Mr. Mulvaney?

A. 8438-9th Southwest.

Q. Where are you employed, sir?

A. Golden Grain Macaroni Company.

Q. How long have you been employed there?

A. About six (6) years.

Q. In what capacity, sir? A. Foreman.

Q. And what are your duties as foreman, sir?

(Testimony of Joseph W. Mulvaney.)

A. See that everybody is kept working, doing their work properly, see that the production keeps going all the time, take care of maintenance.

Q. Production maintenance? Supervision of the employees, is that part of your duties?

A. To an extent, yes.

Q. Can you explain to us little more in detail what your duties as supervision of the employees consists of?

A. Oh, setting up machinery; sometimes a [293] decision what is going to be made.

Q. Do you supervise the working conditions under which they work?

A. Supervision, to an extent, yes.

Q. And how many employees do you have working for you under your supervision, Mr. Mulvaney?

A. Around nine (9).

Q. And what do those employees do, sir?

A. Well, there are girls that run the packaging machines. One (1) girl takes care of the shipping room and I have two (2) men that work with me.

Q. I see, and what do those men who work with you do?

A. Dump flour, handle flour, unload cars, receive, help in the operation of the machinery.

Q. Who in the plant is responsible for the cleaning and sanitation conditions?

A. Everyone in the plant is.

Q. By everybody in the plant is responsible, what do you mean by that?

A. Each one in the plant, each individual has

(Testimony of Joseph W. Mulvaney.)

been notified and told that whenever he sees anything that is wrong, to report it or stop it immediately himself to take care of it.

Q. I see. And whose duty is it to see that these things are done? [294]

A. Well, it is the individual's duty if he has the time to do it. If it is something that is a major operation then it would have to be kicked back and we close down and do it.

Q. And what specific instructions have been issued, if any, relative to the control of flies and moths or filth and so on?

A. If there is any noticeable, it is reported to me and I see that that area is sprayed immediately provided it is possible because of operations.

Q. How long have those instructions been in effect, Mr. Mulvaney?

A. Ever since I have been there.

Q. Over six (6) years, is that right?

A. Yes.

Q. And were those instructions in effect and were you carrying out those instructions in June and July of 1951?

A. To the best of my knowledge and ability, yes.

Q. By the way, were you here yesterday when Mrs. Dicecco testified? A. I was.

Q. And do you recall her testimony when she said that on occasions she picked up macaroni off the floor and put it in a bag, did you hear that?

A. She—her statement was that she was told to

(Testimony of Joseph W. Mulvaney.)

pick [295] the macaroni off the floor and put it in containers.

Q. I see, what containers was she told to put it in?

A. At the time she worked there as far as I know she wasn't told to put any macaroni off the floor into containers. That is swept up and goes into hog food.

Q. Swept up and what?

A. Goes into hog food.

Q. Into hog food? A. That is right.

Q. Do you have some sort of container, box or package that you put that in?

A. It is put in a paper bag in a garbage can and removed to the basement and a man picks it up. It is tied.

Q. And those instructions are the same instructions that all employees have?

A. That is right.

Q. Are you familiar with the general products, process of production of macaroni and spaghetti and noodles carried on by Golden Grain Macaroni?

A. I am.

Q. By the way, Mr. Mulvaney, you indicated that you were in charge of production. Who is the general manager of the plant out there?

A. Mr. Dedomenico.

Q. Mr. Dedomenico. And in his absence who is in [296] charge of the plant and production?

A. Well, I am in charge of production insofar as the making of the paste itself is concerned.

(Testimony of Joseph W. Mulvaney.)

Then there is a girl in charge of shipping and packaging down there on the second floor.

Q. Is Mr. McDiarmid the manager in Mr. Dedomenico's absence or——

A. I never understood it that way, no. It was sort of a share deal amongst all of us.

Q. And what were Mr. McDiarmid's duties in the absence—what were Mr. McDiarmid's duties out there?

A. To run the office and run the sales end of it.

Q. Mr. McDiarmid was in charge of the sales end? A. Yes, he was.

Q. And in the absence of Mr. Dedomenico what was Mr. McDiarmid's duties?

A. Well, the same thing practically except that he was more around the building. I don't mean—I mean he was on the premises more when Mr. Dedomenico was gone.

Q. Well, on any occasion when any requests were made for inspection or anything like that when Mr. Dedomenico was present, what would you do?

A. Well, I'd have nothing to say about it. It would never reach me. [297]

Q. Well, when Mr. Dedomenico was absent my question was, what——

A. Oh, well, in that case I still don't feel that I can assume that responsibility.

Q. Would you contact somebody?

A. I would call him myself.

Q. Mr. Dedomenico?

(Testimony of Joseph W. Mulvaney.)

* * *

A. (Continuing): Yes, I would, I would contact Mr. Dedomenico.

Q. On July 18th of 1951 were you contacted by Mr. Shallit and Mr. Allen relative to an inspection they desired to make of the premises?

A. I was contacted by them through the secretary.

Q. Oh, I see. They didn't come down to see you?

A. I never went up to the third floor to my knowledge.

Q. The third floor? A. Production floor.

* * *

Q. Mr. Mulvaney, calling your attention particularly now to the period of June of 1951, was Mr. Dedomenico present at that time—excuse me, July of 1951? [298]

A. I couldn't say as to whether he was there part of July of 1951.

Q. Was he there on July 18th or 19th of 1951?

A. No, he was not.

Q. Do you know where he was?

A. He was in San Francisco.

Q. Do you recall whether or not he left for San Francisco in the latter part of June of 1951?

A. I think that is correct.

Q. Do you recall whether or not at the time he left there had been anything done relative to the cleaning of the equipment in the plant?

A. Just a day or so before he left the entire

(Testimony of Joseph W. Mulvaney.)

flour assembly line all the way through was cleaned out.

Q. You say you cleaned out the assembly line all the way through. Can you start with the place where the flour was put in. Take this pointer here and start where—your general process of cleaning that was followed by you when you cleaned up the plant in June of 1951.

A. We started specifically at this point here (indicating sketch).

Q. And that is the hopper?

A. The hopper.

Q. I see. What did you do and explain in detail what was done. [299]

A. That was vacuumed out completely of all flour and carried on through the whole system, completely vacuumed out of flour so there was nothing in there in the way of flour or debris of any kind.

Q. You say the whole system, you mean the hopper? A. The hopper, the screw here.

Q. The elevator, the screw?

A. Into the elevators and buckets, into the main storage bin. The screw that runs across the top of it, the screw at the bottom of it, and then through the trap bottom of the final elevators that take it up to be carried over to the mixer.

Q. I see.

A. That was all vacuumed clear of flour and then paint brushes were taken and spray was

(Testimony of Joseph W. Mulvaney.)

painted on the entire interior completely all the way through.

Q. By all the way through you mean the entire system was painted that you just finished vacuuming out? A. That is right.

Q. And you painted it with a spray?

A. With a spray.

Q. What type of spray did you use?

A. I am not too familiar with the name. It is some type of spray—well, it is sold by United States Insecticide. They advocate it. [300]

Q. Do you know whether or not it is that two per cent (2%) chlordane spray that Mr. Shallit referred to? A. I couldn't say.

Q. And what is the purpose of using that spray now?

A. Well, in the spray itself, when you are spraying the only thing you actually kill is a live moth. Any larvae or anything of that type unless you come in actual contact with a wetness of the spray it doesn't seem to have any effect on it. That is the reason that I do use the brushes to paint the whole thing.

Q. You use the brush instead of spraying it on for that purpose?

A. So if there is any crevice or anything it can run in there.

Q. And you did that throughout the entire system? A. That is correct.

Q. I see. Now what else did you do or was done

(Testimony of Joseph W. Mulvaney.)

under your direction at that time relative to cleaning up the place?

A. Well, during the period of that month?

Q. During the month of June or the month of July what followed?

A. Well, the month of June or July, either would be correct, the trays are all gone over and cleaned.

Q. What did you do between the trays? [301]

A. Use an air gun, blow them out completely in all the cracks where your screen and wood come together and then they are sprayed directly with a fine hand spraygun. Before we got that gun they were painted with a brush.

Q. You used a hand spraygun on all the trays. And what else was done relative to cleaning the plant at that time?

A. Well, it is just general cleaning which goes on continually. There is painting, always painting to do, always cleaning to do.

Q. Well, will you describe in detail what you actually did from the latter part of June through July of 1951, each day, relative to the cleaning?

A. I don't think I can do that.

Q. Well, can you tell us—I don't mean what you did on any one particular day, but generally during that period of time what did you do, Mr. Mulvaney?

A. Well, the floors are always a problem because you can sweep and right behind you is dust again so naturally that is something that is being taken care of all the time.

(Testimony of Joseph W. Mulvaney.)

Q. You swept the floors every day, is that correct? A. That is right, several times.

Q. What else is done?

A. The flour tank outside gets vacuumed off at [302] least once a week.

Q. And what else was done?

A. Well, any drier that I check that needs cleaning or painting would be taken care of.

Q. When you check the driers now, what would you do to check them and what would you do when you found anything there?

A. The first thing I do is to gas them. In other words, to close the drier up and spray it because it doesn't do you any good to start cleaning if there is a live moth in there and you disturb him, he is gone. First thing you do is kill what is in there with a spray and then go in and clean and vacuum, and if it needs painting, paint it.

Q. And what determines whether or not it needs painting?

A. Well, I determine that by whether I think it is in a condition where it does need painting.

Q. What is the condition that makes you determine that?

A. Well, if the wall is marked extremely much, or something like that, or if the paint maybe is peeled or if anything like that happens or something happens to rub against there like grease from a motor, you can't remove that.

Q. And the spray that you use in the drier is used [303] for what purpose there?

time is spent in percentage in proportions spent in (Testimony of Joseph W. Mulvaney.)

A. Used to kill any insects.

Q. And more particularly, this Mediterranean Moth, flour moth?

A. That is the big problem, yes.

Q. Now, in the elevators that are used in the Golden Grain Manufacturing Company, what process do you use to clean or fumigate those?

A. Well, they are opened up. They are made in such a way they can be opened up on the sides and they are all brushed down with a dry brush prior to spraying them or painting them with a spray, and the residue that is brushed down is picked up with a vacuum.

Q. And is that the same procedure that was followed in June and July of 1951?

A. That is right.

Q. As a matter of fact, is that a part of the standard procedures that you use out there?

A. That is correct.

Q. Can you give us any estimate as to how much cleaning related to the production time?

A. Oh, I'd say close to half.

Q. Mr. Mulvaney, are you familiar with the general procedures of production and the amount of flour that is [304] used in the production and so on?

A. Roughly, yes.

Q. What amount of flour would be used by the Golden Grain Manufacturing or was used by the Golden Grain Manfacturing for the production in July of 1951?

(Testimony of Joseph W. Mulvaney.)

A. Well, it would be a matter of pencil and paper, but I figure we run around from fifty-three to fifty-five hundred pounds (5300 Lbs. to 5500 Lbs.) of flour through per eight (8) hours.

Q. About fifty-three hundred to fifty-five hundred pounds (5300 Lbs. to 5500 Lbs.) of flour each eight (8) hours? A. That is right.

Q. And were you in production just eight (8) hours a day during that time?

A. I am not sure. I think during that time we were manufacturing for the Army and there could have been two (2) other shifts working. I wouldn't say for sure, especially at the first part of that period.

Q. So you might have been working three (3) twenty-four (24) hours a day?

A. That is possible.

Q. And if that is true, then roughly running through around one hundred twenty-five thousand to one hundred thirty thousand pounds (125,000 lbs. to 130,000 lbs.) of [305] flour each day?

A. That is fairly accurate, yes.

Q. Now, Mr. Mulvaney, based upon your experience now as the production end of this business, are you familiar with the general characteristics and life cycle of the moth?

A. To a certain extent, yes.

Q. Can you relate to us what your experience has been relative to that?

A. I know most of my experience is the fact that they multiply very fast and I don't know, the

(Testimony of Joseph W. Mulvaney.)

life cycle is only what I picked up since I have been sitting here, which I don't know anything about, but I do know one day you don't see them and the next day you do.

Q. And after you make a through cleaning as you have testified to here, in June or July of 1951, would moths appear shortly after such cleaning?

A. That is possible, sure, because you'd have to clean the whole building at one time and you couldn't do that.

Q. And do you recall at this time, sir, how soon after this cleaning that moths again appeared, or do you know? A. I don't know.

Q. Now this total amount of flour that you referred to, does that all pass throught this same procedure, go into [306] the hopper through the conveyor and elevator system and so on?

A. That is right.

Q. All the flour goes through that same identical process, is that right? A. That is right.

Q. Do you have occasion, sir, to inspect the flour that goes into the production at the Golden Grain Company?

A. I do in so far as the sacks themselves are concerned.

Q. Did you in July of 1951 observe those sacks of flour that were used in production?

A. I did, yes.

Q. Can you state whether or not in your experience for the time you have been there, that you have

(Testimony of Joseph W. Mulvaney.)

found flour sacks and flour used in raw material to be free from any insects or moths?

A. To the visual eye, yes at times.

Q. And what occurs after the flour say is there for awhile?

A. I don't know what you mean by that.

Q. Well, with relation particularly to the existence or nonexistence of moths in the raw flour, can you tell us what happens when you get the raw flour in?

A. Well, it is possible that there is infestation in [307] the flour. It has been proven that, I think, that there is such a thing.

Q. Do you occasionally find moths in the boxcars in which the flour came into the plant?

A. No, I can't say that I have.

Q. But you did find some on the sacks of flour themselves? A. Yes.

Q. Now, in the process of production is any attempt made to sift out the moths or other contaminating features?

A. Well, yes. In the first principal of the whole thing is that your sack is swept off or dusted off.

Q. Yes?

A. On the outside and then is dumped.

Q. Yes?

A. Then it goes through your two (2) different screens.

Q. Why do you sweep it off or dust it off on the outside?

A. Because of particles that may be adhering to the outside.

(Testimony of Joseph W. Mulvaney.)

Q. I see, and is that the same procedure that was followed in July of 1951? A. Yes, sir.

Q. Well, after you dust off this sack and shake it off, [308] or clean it off you then dump it; in it goes into the hopper. Then is there any other sanitary method used to prevent anything from being in the product?

A. There are two (2) wire mesh sifters.

Q. Two (2) wire mesh sifters? A. Yes.

Q. Where are they located?

A. One is located before it goes into the storage bin and one located just before it goes into the mixer.

Q. What is the purpose of these sifters here?

A. To take out any particles or foreign substance.

Q. How large a screen is it, or how fine a screen is it, is perhaps a better term?

A. Well, I couldn't say. I mean it is a very fine screen.

Q. Is it a twenty (20) mesh screen, or do you know?

A. I don't know how you classify screens.

Q. Extremely fine, though?

A. That is right.

* * *

Q. (Continuing): Well, are the holes in the mesh visible to the naked eye? [309] A. Yes.

Q. Now, in June and July of 1951, Mr. Mulvaney, did you observe the general sanitary conditions there in the plant itself?

A. Yes, I did.

(Testimony of Joseph W. Mulvaney.)

Q. Can you testify, sir, as to what those sanitary conditions were, whether it was sanitary or unsanitary?

A. To my knowledge they were sanitary.

Q. Were there present any moldy or decomposed matter in the processes of production?

A. No.

Q. Did you—were there a lot of flies present buzzing around? A. No.

Q. Any rats or mice present?

A. I didn't see any.

Q. Any evidence, any rat pellets or mouse excreta of any sort? A. No, sir.

Q. Mr. Mulvaney, do you recall the general characteristic as to the temperature, that is, the heat, humidity in Seattle at that particular time?

A. As I recall it, it was very warm.

Q. And based on your experience, what effect does that have on the life cycle of the moth? [310]

A. It seems to speed it up.

Q. You don't know how much it was speeded up or anything? A. No, sir.

Q. Do you know the length of time it would take the moth to emerge from the pupa stage to the moth stage? A. I do not.

Q. In your experience, sir, how soon after, say the elevators were cleaned, would this webbing appear?

A. Oh, I'd say within three (3) or four (4) days it would be possible.

Q. I see, and when webbing did appear, what

(Testimony of Joseph W. Mulvaney.)

would you do, what instructions were left with the employees as to what they should do?

A. That would be to give a general cleaning throughout the flour system.

Q. And during the period of June and July of 1951 were those the same instructions, sir?

A. That is right.

Q. And did you make inspections that often during the period of June and July of 1951?

A. No, not quite that frequently.

Q. How frequently would you make inspections?

A. Oh, I'd say about every week, six (6), seven (7) days, something like that. [311]

Q. Do you recall the date of the last inspection that you made prior to July, the 18th and 19th of 1951? A. No, I don't.

* * *

Cross-Examination

By Mr. Sager:

Q. Mr. Mulvaney, as I understand this place was—this flour carrying equipment was cleaned out sometime in June just before Mr. Dedomenico left here? A. That is correct.

Q. Can you fix that date any closer?

A. No, I can't make it specific.

Q. It was sometime in June, is that your understanding? A. Yes, sir.

Q. And it hadn't been cleaned out, that is, this conveying system hadn't been cleaned out between that time and the inspection by the two (2) inspectors?

(Testimony of Joseph W. Mulvaney.)

A. Had been cleaned out? No, sir.

Q. You speak about painting from day to day and time to time. Are you talking about painting this spray or painting paint?

A. It could apply to either one because they are both used, but at that instance I was talking of paint.

Q. You stated that this Mediterranean moth is your [312] big problem down there. That is the inspectors were talking about. Do you recognize that as the Mediterranean moth or——

A. With my knowledge yes, I do.

Q. At any rate it is the moth that you have there all the time? A. Yes, sir.

Q. And the moths are the moths that they were finding on the day of their inspection?

A. That is correct.

Q. It is the same type of moth all the time?

A. Yes.

Q. You were present during part, at least part, of the inspection that these two (2) inspectors were making there? A. Yes, sir.

Q. They started out with the hopper and then went to the conveyor, the screw conveyor underneath the hopper and then through the elevators and the other conveyors as they testified?

A. Yes, sir.

Q. Were you there during the course of that?

A. I was in the building, yes.

Q. And they spoke to you sometimes shortly

(Testimony of Joseph W. Mulvaney.)

after starting their inspection, didn't they, [313] or——

A. It was practically, I think immediately as they—just as they started their inspection.

Q. They told you what they had found already and suggested that you close down the operation until they completed their inspection?

A. Yes, sir.

Q. And in view of the large amount of insects and evidence they were finding said that you probably would want to clean it out before you resumed operations? A. That is right.

Q. And as a result,—and you saw what they were finding there, did you? A. Yes, sir.

Q. And they were finding these moths and webbing and larvae and all these——

A. I saw the moths.

Q. Well, didn't you see this webbing and that sort of thing that they——

A. No, I didn't follow them all the time.

Q. Did you ever observe this large area of webbing on the, and cocoons on the wall, that is shown in this picture, Exhibit 15?

A. They called my attention to that, too, I think.

Q. They called your attention to that?

A. Yes, sir. [314]

Q. It was quite visible? A. Yes, sir.

Q. Apparently—well, that had been there some time, had it not?

A. I couldn't say as to the length of time.

(Testimony of Joseph W. Mulvaney.)

Q. You know these cocoons don't form over night?

A. I couldn't say as to that either.

Q. You hadn't observed that up there before?

A. Oh, yes.

Q. Oh, yes?

A. It has been brushed down before.

Q. This same bunch of stuff had been brushed down? A. It couldn't be the same bunch.

Q. Well, this moth, this Mediterranean moth, was present around the factory practically all the time, wasn't it? A. To a certain degree.

Q. To one degree or another? I mean sometimes worse than others, but it was always present?

A. That is right.

Q. The live moths were always present to some extent? A. To some extent.

Q. And they came in contact with the food product and drying rooms or could come in contact with it; they were in that area?

A. That is possible, yes. [315]

Q. I understood you to say that you supervised these employees, that is, all of them in the plant, is it nine (9) of them?

A. That is excluding the office. I have no jurisdiction over that at all.

Q. You have nothing to do with the sales force I take it? A. No, sir.

Q. But in the actual operations, maintenance of the plant, production, you are in charge of those many employees?

(Testimony of Joseph W. Mulvaney.)

A. That is correct, under Mr. Dedomenico if he is there.

Q. I understand he is the boss over everything?

A. That is correct.

Q. By the way, who hires and fires this help?

A. Mr. Dedomenico.

Q. Who determines what products are going to be produced at a certain time, or how much?

A. That is determined by either he or myself, according to what the sales girl or the shipping girl needs.

Q. And when Mr. Dedomenico is in town, what part does he take in the actual management or operation of this plant?

A. Just on the business end of it is all.

Q. Is he in the plant? [316] A. Oh, yes.

Q. I understand he hires and fires the employees? A. Yes, sir.

Q. Did I understand you to say Mr. McDiarmid was sales manager and office manager?

A. No. He—sales manager is his official title. But if Mr. Dedomenico is not there he usually takes over the office in his absence.

Q. In other words he operates the business end of the business in the absence of Mr. Dedomenico?

A. Insofar as sales and such is concerned. I don't think he has anything to do with the buying or anything like that.

Q. You say that he is around the premises more in the absence of Mr. Dedomenico?

A. Yes, sir.

(Testimony of Joseph W. Mulvaney.)

Q. That is for the purpose—that is because of his increased duties in the absence of Mr. Dedomenico?

A. Well, yes, due to the fact that he can contact the salesmen if they want to refer back to the office, why he is there. They don't have to hunt for him. If Mr. Dedomenico is there, why he can answer the question.

Q. When Mr. Mulvaney—is there any fixed time in the course of the day, the eight (8) hours' work to do up, [317] do the cleaning?

A. Generally cleaning all the time, but the girls have been instructed to close down from fifteen (15) to twenty-five (25) minutes before quitting time and clean up around their own particular area that they are working in.

Q. And that cleaning constituted sweeping up this large amount of flour that would accumulate on the floor and that sort of thing?

A. Whatever happens to be there, yes.

* * *

Q. They didn't go into this machinery and clean out in there, did they? A. No, sir.

Q. These girls? And of course, all of this food or flour conveying system was all encased and that had to be taken down to get into it to clean inside?

A. That is correct.

Q. The women didn't do that?

A. No, sir.

* * *

(Testimony of Joseph W. Mulvaney.)

Redirect Examination

By Mr. Yothers:

Q. How long does it take to do the type of cleaning, [318] for example, that you testified to that was done in the latter part of June and first of July of 1951?

A. Well, it takes three (3) men about twelve (12) hours to clean out the elevators, the bin and sifter, that entire——

Q. And to clean out the drying room and things of that sort, is that done on stated times, or——

A. No, that is done during working hours as it is needed or as they are emptied out.

Q. So that is cleaned then, would you say, every day? A. That would be very close to it.

Q. Now, does anyone clean any part of this equipment that they are working on? You say they close down fifteen (15) to twenty-five (25) minutes —do they clean their machines they are working on or just clean the area around the machine?

A. You mean in the evening when they shut down?

Q. Yes.

A. They clean the machine and the area around.

Q. And how often is that done?

A. That is done every evening.

Q. I don't believe I asked you, Mr. Mulvaney, how often do you spray for this moth particularly

(Testimony of Joseph W. Mulvaney.)

during the period of time, June and July of [319] 1951?

A. Well, it is—I couldn't say. It depends upon the heat and if you notice moths, why then you spray. If you notice them more the next day you have got to spray again. You spray sometimes twice a week, sometimes once a week, depends on the necessity.

* * *

Q. Well then, I take it during June and July of 1951, do you know how often you sprayed during that period of time?

A. I couldn't say but I'd say roughly once a week. [320]

* * *

VINCENT MICHAEL DEDOMENICO

being first duly sworn on oath was called as a witness on behalf of the Defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. State your name, please.

A. Vincent Michael Dedomenico.

Q. And are you related to the defendant Paskey Dedomenico? A. Yes, sir.

Q. Where do you reside, sir?

A. 16845 Barbara Drive, San Leandro, California.

Q. Do you have any relationship with the Golden Grain Macaroni Company, sir?

(Testimony of Vincent Michael Dedomenico.)

A. Yes, sir.

Q. In what capacity?

A. I am secretary-treasurer of the corporation. I am general manager of the San Leandro plant.

Q. Who owns the Golden Grain Macaroni Company, sir?

A. Basically it is owned by three brothers, Paskey, myself and my younger brother, Tom.

Q. And how long have you and the family been engaged in the manufacture of macaroni products?

A. Since 1912.

Q. And how long has Paskey been [321] engaged?

A. I don't know exactly. I know it is at least five (5) or six (6) years more than myself and I have been at it for seventeen (17) or eighteen (18) years.

Q. Are there any other stockholders or persons who have an interest in it?

A. Yes, there are two (2) or three (3) other stockholders.

Q. Are they all related to your immediate family?

A. Not all of them. Several are not related, and one is a cousin.

Q. Now, in June and July of 1951, do you know in what capacity Mr. Paskey Dedomenico served in it?

A. He is president of the corporation and general manager of the Seattle plant.

Q. Are you acquainted with the general office

(Testimony of Vincent Michael Dedomenico.)

setup and the various duties and responsibilities of Mr. McDiarmid and Mr. Paskey Dedomenico and Mr. Mulvaney in the Seattle plant, sir?

A. Yes, I have a working knowledge of it.

* * *

Q. And in June and July of 1951, sir, what capacity did Mr. McDiarmid play?

A. Sales manager.

Q. And as such what were his duties?

A. Well, he is in charge of all sales in this area. [322]

* * *

Q. Does he have anything at all to do with the production or the maintenance and operation of the plant of the Golden Grain Manufacturing Company here in Seattle? A. No, sir.

Q. What are Mr. Mulvaney's duties, sir?

A. Well, Mr. Mulvaney is, I would term production manager. I guess they call them foremen up here.

Q. What are his duties, sir?

A. Well, he is in charge of all production of macaroni products inside the plant.

Q. And was he in June and July of 1951?

A. To the best of my knowledge, yes.

Q. Do you recall when Mr. Dedomenico came down there to San Francisco, San Leahdro in 1951?

A. I don't remember the day he arrived. I don't have a memory for dates.

Q. Well, can you tell us if it was before or after the 4th of July?

(Testimony of Vincent Michael Dedomenico.)

A. It was before the 4th of July, yes.

Q. And who was in charge of the plant, the factory, the warehouse, when Mr. Dedomenico was absent from the [323] city of Seattle, sir?

A. Well, I would have to assume. Not being here I don't know.

Mr. Sager: I object to that——

Q. Do you know—excuse me. You say you have a working knowledge of the relationship and the responsibilities of Mr. Mulvaney and Mr. McDiarmid and Mr. Dedomenico. Now, do you know who was in charge of the plant and the operations when Mr. Dedomenico was absent in July of 1951?

A. Well, Mr. Mulvaney would be in charge——

Mr. Sager: Just a moment. The witness already testified that not being here he didn't know, he would have to assume.

The Court: Well, I believe I will allow him to testify from his general knowledge of the business who would normally be. That is the point you are getting at, isn't it?

Mr. Yothers: Yes.

The Court: I will allow you to establish that although the means are a little devious. You may answer the question.

A. (Continuing): Well, Mr. Mulvaney would be in charge of production in the absence of Mr. Dedomenico, Paskey.

Q. As such would he be the custodian of the plant [324] down there? A. Yes, he would.

Mr. Sager: I object to that. I think that calls

(Testimony of Vincent Michael Dedomenico.)

for a conclusion, a legal conclusion of this witness.

The Court: Sustained.

Q. Mr. Dedomenico, have you had occasion to inspect various macaroni manufacturing plants throughout the United States?

A. Well, I have visited a lot of macaroni plants in this country.

Q. How many of them have you visited, sir, in the period of time——

A. I'd say at least twenty-five (25) or thirty (30).

Q. And are you familiar with the general conditions as to sanitation in those plants?

A. Well, I make an observation as I walk through the plants, yes, but I don't make a detailed inspection.

Q. And are you familiar with the conditions of sanitation of the Golden Grain plant here in the city of Seattle?

Mr. Sager: I think I will object to this comparison of this plant with other plants.

The Court: He is tending to get near that, but he hasn't yet. [325]

Mr. Sager: If he has some other purpose I will withdraw the objection, your Honor.

The Court: This question is proper, whether or not he is familiar with the sanitation methods employed in the Seattle plant.

Q. (Continuing): Are you?

A. Yes, I am familiar with them.

Q. Based upon your knowledge and background

(Testimony of Vincent Michael Dedomenico.)

and experience, Mr. Dedomenico, would you say that the Golden Grain Manufacturing plant was a sanitary or unsanitary plant?

Mr. Sager: I will object to that.

The Court: The objection is good.

Q. (Continuing): San Leandro, excuse me, I eral manager of the plant down in San Francisco, have you become acquainted——

The Court: He is the manager in San Leandro.

Q. (Continuing): San Leandro, excuse me I thought that was San Francisco. As the manager of the plant down in San Leandro, have you become acquainted with the general problems of production and sanitation, sir, in the manufacture of macaroni products?

A. Yes, I am very close to them.

Q. And have you been dealing with such problems for many years?

A. Well, there are constant problems in every macaroni [326] factory.

Q. And approximately how long have you been so engaged? Did you say seventeen (17) years?

A. Since 1933, that would be nineteen years (19).

Q. In your opinion, sir, is the plant, the Golden Grain Manufacturing plant here in the city of Seattle sanitary or unsanitary plant?

Mr. Sager: I will object to that question, your Honor.

The Court: Sustained on the ground it calls for an opinion and conclusion of the witness.

Mr. Yothers: I will qualify the witness, your

(Testimony of Vincent Michael Dedomenico.)

Honor, as an expert witness based on the background and experience dealing with questions of sanitation and manufacturing.

The Court: Disallowed.

Q. (Continuing): Have you become through your experience and background, sir—excuse me.

Mr. Yothers: May I address a question to the Court?

The Court: Yes.

Mr. Yothers: Is the ruling of the Court based upon the ground that the qualifications of an expert witness have not been established?

The Court: Yes. This man has testified he [327] is the secretary and treasurer of this corporation. It is true he has visited some twenty-five (25) or thirty (30) plants throughout the United States. I don't see that that qualifies him as an expert on sanitation.

Mr. Yothers: Well, perhaps, your Honor didn't recall the question I asked him in which he stated that he had been, is manager of sanitation and went through the plant for some nineteen (19) years and been acquainted and dealing with questions of sanitation.

The Court: Yes, but that question gets us into the question of comparison between the standards that are applied in one plant as opposed to those which are applied in another, and that is a field in which I will not allow you to enter. We are only concerned on what happened at this particular plant.

(Testimony of Vincent Michael Dedomenico.)

Q. (Continuing): Sir, do you occupy any official position in the National Macaroni Association?

A. Yes, I am a director of the National Macaroni Association.

Q. And what is that association, sir?

A. It is a group of macaroni manufacturers. It is a voluntary organization and it is probably joined by manufacturers [328] that represent eighty per cent (80%) of the production of macaroni in the United States.

Q. And does it concern itself with questions of sanitation and sanitary procedures and manufacturing procedures of macaroni as one of its problems?

A. Well, the association does not deal into sanitation.

Q. It does not? A. No.

The Court: May I ask a question? Have you, yourself, made an independent study of the problem of sanitation as it affects macaroni plants?

The Witness: As it affects macaroni plants generally, no. As it affects my own plant, yes, we study that thoroughly all the time.

Q. Having made, sir, a study also of the sanitation problems so far as it concerns the plant here in Seattle?

A. I am cognizant of what goes on up here and what the problems are.

Q. And how long have you been, have you had relationship with the Seattle plant?

A. Well, since we first purchased it in 1941.

(Testimony of Vincent Michael Dedomenico.)

The Court: How many times have you visited since 1941?

The Witness: I'd say once a year.

Mr. Yothers: At this time, your Honor, I [329] propose to propound the same question as to the opinion as to the sanitation procedures adopted and used by the plant in his opinion as to whether it is sanitary or unsanitary.

The Court: Don't be ridiculous, on a basis of a visit to the plant once a year. I will not allow you to pursue that any further.

The Witness: Well, it is more than a visit, your Honor.

The Court: I know it. I assume you make a complete inspection once a year, but it isn't sufficient, in my opinion.

Q. How long a period of time would you spend on those visits up here once a year?

A. I will be in the plant for two (2), three (3) or four (4) days, depending on how much time I have to spend here in Seattle, but I will be in every phase of the operation.

Mr. Yothers: I assume your Honor's ruling will be the same?

The Court: Same.

Q. Sir, during the period of time you have been engaged in the business and manufacture of macaroni products, have you become acquainted with the general characteristics of the Mediterranean flour moth? [330]

A. Yes, we have. I have, rather.

(Defendants' Exhibit A-2 marked for identification and admitted in evidence.) [337]

* * *

JOHN SPINELLI

being first duly sworn on oath, was called as a witness on behalf of the Defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. State your name, please, sir.

A. John Spinelli.

Q. Where do you live?

A. 7966 Seward Park Avenue, Seattle.

Q. What is your occupation, sir?

A. I am a chemist for the Food Chemical and Research Laboratory in Seattle.

Q. Will you list your training and background and experience, Mr. Spinelli?

A. I have been working for the Food Chemical and Research Laboratory for about four and one-half (4½) years. I received my degree, I have a Bachelor of Science, from the University of Washington. I am a member of the American Chemical Society and a member of the Food Technologists.

Q. How do you obtain membership in the American Chemical Society?

A. Through experience in the chemical field and if you are qualified in—if you have a degree or have been a chemist for, I believe the requirements are from three (3) to five (5) years. There are

(Testimony of John Spinelli.)

various requirements, but [338] a degree is not essential as long as you have been in the field.

Q. And how do you acquire membership in the Food—what did you say it was?

A. Food Technologists.

Q. Food Technologists Society?

A. That is similar to the Society. It is through experience and schooling.

Q. And what are your duties as the chemist out there for Food Research and Analysis Company?

A. Well, mostly as an analyst. We do some development, some research.

Q. And are you familiar, sir, with the methods of analysis and tests run on food products such as macaroni products? A. Yes.

Q. And on other wheat semolina products?

A. Yes.

Q. Have you run an analysis of that sort, sir?

A. Yes, I have.

Q. And over what period of time have you done that? A. About four (4) years.

Q. Are you presently so engaged in that business? A. I am.

Q. And has that been before the Food Research Analyst [339] group during that period of time?

A. You mean with the corporation I am engaged with now?

Q. Yes. A. Yes, it is.

The Clerk: Defendants' Exhibit A-3 for identification.

Q. Handing you what has been marked as de-

(Testimony of John Spinelli.)

fendants' Exhibit A-3 for identification I will ask if you can identify that, sir?

A. Those are samples of cut macaroni that I obtained from your law offices for analyses, filth analyses.

Q. And when did you get those samples?

A. November 24, 1952.

Q. And what was the condition of the sack or bag at the time you received it?

A. They were in good condition, they were all sealed, the bag was sealed and the contents were not opened. I mean the samples in there were all sealed and appeared in good condition.

Q. Did you have some sort of a marker or sticker or identifying tag on them?

A. Well, the seal bore the seal of the Food and Drug Administration and the samples were numbered sub 1, 2, 3, etc., whatever the case may be. There were more subs in some [340] samples than there were in others.

Q. And was there any markings or identification on the seal of the Pure Food and Drug Administration?

A. Yes, they were marked. They had a date; the date in the case of the macaroni products was 11/14/52. The inspector had his signature on it which was Menno D. Voth and, as I said——

Q. Did it have some identification or code number on it?

A. Yes, they were coded, Count 2 and Count 3.

(Testimony of John Spinelli.)

I received Count 2 to Count 6 and each Count was coded with an individual code.

Q. What was the code number on that Exhibit A-3?

A. This particular one that you have here?

Q. Yes. A. 30-340 W. [341]

* * *

Mr. Sager (Continuing): We will stipulate that these packages are the portions of the original samples taken which were turned over to them upon their command.

The Court: Very well.

Mr. Yothers: I will offer in evidence then A-3, A-4, A-5 and A-6, your Honor.

The Court: They may be received and marked.

(Defendants' Exhibits A-3, A-4, A-5 and A-6 marked for identification and admitted in evidence.)

Q. Would you take the Exhibit A-4, sir, and break the seal? By the way, who placed that seal that is on there now? A. I placed it on.

Q. When did you place that seal on?

A. After the samples were analyzed.

Q. And have these samples been in your possession all the time, sir?

A. Yes, they have, in the laboratory. [342]

Q. Have they at any time been in the possession of the defendants or anyone other than yourself since the date you received them?

A. No, sir.

(Testimony of John Spinelli.)

Q. Will you break the seal.

* * *

Q. (Continuing): And will you take from that sample A-4, sir, one (1) of the sub portions. Now, are there other portions of that sample there in A-4?

A. I believe there are six (6) of them, no, five (5).

Q. Besides that one?

A. Four (4) besides this one.

Q. Well, is that sub sample that you have received there, is that in the same condition as it was at the time you received it from our office?

A. To my knowledge it is. It should be in the same condition. I see that I opened this one to take out part for analysis.

Q. And are the other sub portions of the sample——

A. Some of the other ones haven't even been opened. I opened only two (2), I think, in this one. That is right.

Q. Did you have occasion, sir, to run any sort of tests or analyses of the samples contained therein, A-3?

A. Yes, I ran some analyses on all the products that were submitted to me but because of the length of time I had, I [343] was only able to analyze portions of each sample.

Q. What portion of each sample did you analyze, sir?

A. Well for example, on this particular sample

(Testimony of John Spinelli.)

here I—for my sample I took about a hundred and fifteen grams (115 gm.) out of two (2) subs, sub 2 and sub 5.

Q. And what sort of a test did you make on it, sir, and will you describe the process that you used?

A. I ran an insect fragment test. The method is described in the A.O.A.C., Association of Official Agricultural Chemists. I used——

Q. Is that the same type of test, sir, do you know, that is used by the Pure Food and Drug Administration?

A. I believe it is. Do you want me to go into detail?

Q. Yes, will you describe it please?

A. You weigh out a sample. Your sample should weigh two hundred twenty-five grams (225 gm.). You should have at least a fifteen hundred millimeter (1500 mm.) beaker clean. You place your sample in this beaker. If the product is spaghetti, you should break up your product so you can facilitate digestion.

You take about a liter of one or two per cent (1% or 2%) hydrochloric acid. You should heat your hydrochloric acid, your solution of hydrochloric acid and pour it over your sample. Then you should cautiously bring your sample to a boil, stirring, until you have finally [344] digested your sample and that requires, oh, probably two (2) hours, one (1) or two (2) hours. You should then cool your sample. You should then neutralize your

(Testimony of John Spinelli.)

sample with sodium hydroxide, usually a very concentrated solution of sodium hydroxide, about one to one (1 to 1). That will—the idea is you will further digest this sample with a pancreatin solution. You should bring the pH of your sample to eight (8).

Q. What do you mean by pH?

A. I will say acidity, between seven (7) and eight (8). Then you buffer your solution further with sodium phosphate.

Q. What do you mean by buffer the solution?

A. When you add pancreatin solution it will change the pH of the solution, that is, it will change the acidity. In order to get maximum digestion you want to maintain the pH between seven (7) and eight (8), and that is what a buffering solution does.

After the sample is cooled you should again heat it to about forty degrees (40°) centigrade. You add a pancreatin solution, about five grams (5 gm.) of a solution of pancreatin per your half pound (½ lb.) sample. You maintain this for about three (3) hours at forty degrees (40°) centrigrade. At that time your sample should be pretty well digested. You then bring your sample to a boil, cool it again and transfer it quantitatively to a Wildman [345] flask. Add about forty millimeters (40 mm.) of gasoline and trap off your insect particles. The object of the gasoline is to float out your insect particles. You trap them off onto a ruled filter paper and if you have done everything all right you shouldn't get too much other material besides

(Testimony of John Spinelli.)

insect fragments, probably a few flakes of floury material, and then you are ready to make your microscopic test.

Q. I see. Now, you add the gasoline and that floats off any insect fragments, you said, and put that on what? A. Filter paper.

Q. And what do you do with the filter paper?

A. Then you examine the filter paper under a microscope using—you can scan that filter paper with about a forty (40) power microscope, wide angle.

Q. And is that the process that you used on this sample A-3 and on the other samples A-4, 5 and 6?

A. Yes, sir.

Q. What were the results of the sample that you ran and analyses that you made, sir, on sample A-3 which is the one designated by code 30-340 L?

A. 30-340 L, cut macaroni. I found six (6) insect fragments and I found a couple of pieces of larvae that were not imbedded in the product. I found no rodent contamination and I found some gritty particles.

Q. Now you said you found two (2) pieces of larvae [346] not imbedded in the product. What is the significance of that, sir?

A. Well, if I was to draw any conclusions, it wasn't, obviously it wasn't mixed in with the paste that you make this macaroni from. It either had to come in there from, either had to come in there from some other source—I am not sure it could have come in there when it was in the plant. I

(Testimony of John Spinelli.)

mean, it could have developed in there as far as that goes. That is the only significance I can attach to that.

Q. It wasn't in the product itself, it didn't get in there as a manufacturing product?

A. No. I took this sample, put in the hydrochloric acid and immediately I saw these. They were visible to the eye. I didn't have to use a microscope.

Q. And as to sample A-4 which is code No. 29-871, the elbow macaroni, sir, did you make a test upon that?

A. Yes, I found eight (8) fragments.

Q. Excuse me. Did you make the same test?

A. Yes, the same test on all of these.

* * *

Q. And what were the results of that test, sir?

A. By the way, these results are on two [347] hundred twenty-five grams (225 gm.) of product. Eight (8) fragments in that sample. There was no rodent contamination and the product in this case was not in the best of condition because it had evidences of mold on it. Probably if I had run a moisture on it I would have found that it was probably a little high. I am guessing at that, but mold apparently developed there.

Q. When did the mold develop, sir?

A. Oh, I don't know. I haven't any idea when this mold develops. It shouldn't develop. If the product is in good condition dry mold shouldn't

(Testimony of John Spinelli.)

develop. I believe macaroni products run about twelve per cent (12%) moisture, I don't know, something in that order, and I don't believe any mold should develop on that.

Q. And as to sample A-5 which is——

A. What is the code number?

Q. Count 4, 29-872.

A. Three (3) fragments, no rodent, no miscellaneous.

Q. And as to sample A-6 which is 29-477, Count 4—excuse me, Count 5?

A. Five (5) fragments, no rodent contamination, some particles of grit.

Q. Was there another sample there?

A. Yes, I have Count 6.

Q. When you speak of fragments do you mean insect [348] fragments or insect and larva fragments?

A. Insect fragments. Fragments that I can identify by some characteristic.

Q. You say you can't?

A. That I can identify through some characteristics you know, by which you may identify insect fragments.

Q. Did you bring them all down?

A. Yes, all but Count 3. That was a product that was somewhat moldy.

Q. Oh, excuse me. Well then, A-6 is Count 6 which is 29-478, is that correct.

A. That is what I have here, yes.

(Testimony of John Spinelli.)

Q. And the sample that you did not bring down, A-3, is 29-871? A. That is right.

Q. The one that was moldy? A. Yes.

Q. Sir, did you also have occasion to make an analysis of samples of flour and semolina?

A. Yes.

Q. And where did you obtain the samples of those, sir? A. From your law offices.

Q. Did you have any residue remaining from those [349] samples?

A. I did not bring them with me. I have them at the lab.

Q. What was the condition of the samples at the time you received them as to the sack, bag, and so on?

A. They were sealed. They appeared to be in good condition.

Q. And what was the nature of the seal? Did it have the seal on it?

A. I can read you the nature of the seal. Here, I have copied it down here. They also had the Food and Drug Administration seal. They had the initials FD-415-A, Federal Security Agency. They had the sample number, the date 11/19/52. That was the same date on all the flour samples. The inspector, Menno D. Voth.

Q. How many of those samples did you receive, sir? A. I think there was eight (8).

Mr. Yothers: May we have the same stipulation, Mr. Sager, as to these samples, that they were por-

(Testimony of John Spinelli.)

tions furnished to us by Mr. Monfore in response to our request?

Mr. Sager: I am willing to stipulate that they were the samples you obtained from the Food and Drug Administration. I'd like him to designate, if he can, the sub sample numbers. [350]

Q. Would you do that, sir?

* * *

Q. (Continuing): Excuse me. Referring back to your tests and reports of Count 6, which is code number 29-478 L——

A. Five (5) fragments, no rodent contamination, some particles of grit.

Mr. Sager: We have that. I have that same.

A. (Continuing): I believe it was the same for both Counts 5 and 6.

The Court: That is what my notes reflect, same for Counts 5 and 6.

Mr. Sager: What are the sample numbers then, Mr. Spinelli, on those two (2) of five (5) fragments?

* * *

Mr. Sager: You have two (2) samples in which you say you found five (5) fragments and some filth.

The Witness: That is correct.

Mr. Sager: What are the sample numbers?

The Witness: The sample number on Count 5 is 29-477. That is elbow macaroni, six (6) subs. [351]

* * *

Q. And the other is 29-478 L?

(Testimony of John Spinelli.)

A. That is right, twelve (12) subs.

Q. And by subs you mean sub portions of the sample?

A. By a sub I mean something like that. In other words, there will be five (5) of these packages in one sample.

Q. Now, referring now to your analyses you made of the flour, sir, as to the first sample will you give the sample number and the results of your analysis?

A. The bag was marked "Selected Durum Durella Semolina No. 1, General Mills, Minneapolis, Minnesota. Taken from 89 100 paper bags located in basement. 9 subs Y."

Q. And did you run an analysis of that flour?

A. Yes.

Q. Is that the same type of analysis that you make for macaroni products?

A. Actually it is the same type, yes.

Q. And is it the same type of analysis that is made and used by the Pure Food and Drug Administration for their test? A. I believe so.

Q. What was the result of the analysis of that sample did you receive, sir?

Mr. Sager: Pardon me. Would you give [352] the sub sample number on that?

A. I used one hundred grams (100 gm.) in all cases here when I am talking about flour. The subs are 1, 3, 4 and 9.

Q. What were the results of that analysis?

A. On that particular sample I found seven (7)

(Testimony of John Spinelli.)

fragments, no evidence of rodent contamination, some particles of grit.

Mr. Sager: That is on the entire group of subs?

The Witness: That is of a composite of those subs.

Q. And by fragments you are referring to parts of the insect or larva?

A. Yes, I found some parts of larva in that one that I could identify.

Q. The total of that was seven (7)?

A. Yes.

Q. Now as to the next sample?

A. The next sample was labeled "Gold Medal Durum Flour, General Mills, Minneapolis Minnesota. Taken from 212 100 pound bags in basement. 14 subs Z."

Q. How many samples, or what was the composite?

A. I took some out of each sub label 2, 3, 4, 5 and 11. [353]

Q. What were the results of those anlyses, sir?

A. No contamination of any sort.

Q. Any insect or larva or rodent?

A. No, sir.

Q. And as to the next sample that you took?

A. Next sample was labeled, "this sample is a composite taken from four (4) bags of semolina located next to the hoppers which are on the second floor and part of the flour conveying system." These bags were labeled "Durum Durella Semolina No. 1, General Mills, Minneapolis, Minnesota."

(Testimony of John Spinelli.)

Q. How many subs did you take?

A. One sub.

Q. What amount?

A. This analysis was on one hundred grams (100 gm.).

Q. And what was the result of that analysis?

A. Two (2) insect fragments, no evidence of rodent contamination, some particles of grit.

Q. And as to the next sample?

A. "This sample is a composite from fifteen (15) bags located on the second floor by the noodle manufacturing equipment" labeled "Gold Medal Durum Patent Flour, Unbleached, General Mills, Minneapolis, Minnesota." One (1) sub, one (1) fragment, no evidences of rodent contamination, no grit.

Q. As to the next sample?

A. "Gold Medal Semolina No. 1, General [354] Mills, Minneapolis, Minnesota, taken from forty-one (41) one hundred pound (100 lb.) paper bags located in basement." Six (6) subs.

Q. And how many did you use in your analysis?

A. One hundred grams (100 gm.). Subs were taken from 2, 3, 4, 6.

Q. What was the result of that analysis?

A. One (1) fragment.

Q. And as to——

A. No rodent or particles of grit.

Q. And the next sample?

A. "Cavalier Extra Fancy, No. 1, Wheat Semolina, North Dakota Elevator Co., Grand Forks, North Dakota. From twenty (20) one hundred

(Testimony of John Spinelli.)

pound (100 lb.) paper bags located in basement." Four (4) subs.

Q. The result of that?

A. No contamination of any sort.

Mr. Sager: How many subs did you examine?

A. (Continuing): Oh, excuse me, 2, 3 and 4.

Q. And the next sample?

A. "Excello Durum Patent Flour manufactured by the North Dakota Elevator Co., Grand Forks, North Dakota, were taken from twenty (20) one hundred pound (100 lb.) bags in basement." Four (4) subs, no contamination.

Q. How many subs, which ones? [355]

A. 2, 3 and 4.

Q. And the last analysis?

A. "Sunrise Macaroni, Spokane Flour Mills, Spokane, Washington, taken from twenty (20) one hundred pound (100 lb.) bags located in basement." Four (4) subs. No contamination. The subs analyzed are 1, 2 and 3. In all cases when I am talking there, I have taken a composite from these. I haven't analyzed the whole sample.

Q. As a result of your analyses, sir, what were your conclusions?

A. What do you mean, my conclusions?

Q. Well, as to the contamination?

Mr. Sager: I object to any conclusions other than what he found and he has testified to that. I don't know what other conclusions he is authorized to make.

(Testimony of John Spinelli.)

The Court: His conclusions are reflected in his testimony, aren't they, what he found?

Mr. Yothers: I don't believe so, your Honor, in this respect, that this man is a qualified expert engaged in making these various analyses and familiar with the rules and regulations of the Pure Food and Drug Administration, and I think he is qualified to make a determination and interpretation of his analyses in the light of the [356] matter in question here. That is, whether or not they contain filth, and if the matter they do contain is filth.

The Court: All right, I will allow you to pursue that.

A. I would say in view of the nature of the product I wouldn't consider them filthy.

Q. What do you mean by the nature of the product?

A. Well, it is a type of product you are analyzing. In other words, if you went out in a grocery store or bought a particular type of product and analyzed it for insects, I could think of several products that would have considerably more insect fragments than what I found here. I mean, when you interpret these results you have to take into consideration what you are analyzing. For example, if I was analyzing raspberries and I found, say ten (10) whole insects, thrips or something like that, I wouldn't be surprised at all. I can't consider that filth. It is something that is there, something you can't do anything about.

Q. Referring now to the sample No. 2 which

(Testimony of John Spinelli.)

was on Count 3. You have indicated that you found the product was moldy. Is that a result of the manufacturing process or due to improper storage conditions?

A. It could be a little of both. In other words, if your spaghetti was improperly dried you [357] might have mold develop after a certain length of time, and if your product was improperly stored, you could have mold develop.

Q. Mr. Spinelli, did you make, or have you made any tests or calculations on the quantity basis to determine the relative proportion weighed by the volume of insect fragments that you found in relationship to the total volume or total weight of the product you sampled?

A. No. As a general rule you don't make those when you are analyzing these products. You don't weigh what you find. It is very light, you might say. You have a particle there that is a few tenths of a millimeter in length. The weight is almost insignificant. It would run in parts of a million.

Q. As far as the weight is concerned. What about the relative proportion of it in volume, that is, a total volume of the insect fragments in relationship?

A. Well, volume and weight would be about the same thing. You couldn't make a distinction there.

Q. Well, assuming, Mr. Spinelli, that there were ten (10) fragments in the sample of analysis that you used, what would be the relationship in parts

(Testimony of John Spinelli.)

per million or parts per thousand to the total volume?

A. Parts per million? Oh, I don't know, possibly two or three (2 or 3) parts per million, something on that order. I am guessing on that. I am quite certain though it wouldn't [358] be much more than that if you actually went out and weighed a moth and you would probably find it weighed on the order of, oh between five and 10 (5 and 10) milligrams probably.

Q. About five or ten (5 or 10) milligrams?

A. Yes.

Q. And these insect fragments, about how large are they in comparison to the total weight of the moth?

A. Oh, I don't know. One moth would probably give you about, if it was ground up, probably give you one or two hundred (100 or 200) insect fragments.

Q. And besides these fragments you found as a result of your microscope examination would you say roughly——

A. Yes, that is about right, very small fragments.

Q. So that the total volume of the insect fragments that you discovered in relationship to the total volume of the sample you used was roughly, would you say one or two (1 or 2) parts per million?

A. Something on that order. If you were calculating that out it would run in parts per million.

(Testimony of John Spinelli.)

Q. And the same would be true, would it, so far as the weight is concerned?

A. That is right. You have to make a few assumptions. You would have to assume the weight of the moth had the same density as the spaghetti, but it is so inconsequential in making that kind of a determination that you could safely [359] assume that it would be in parts per million.

Q. Could you give us some example now what you mean parts per million in ordinary daily examples?

A. Oh, probably the foreign particles floating around in this room run over four or five (4 or 5) parts per million. A glass of water perhaps has several parts per million of suspended solids.

Q. You say you took, made microscopic slides, did you? A. That is right.

The Clerk: Defendants' Exhibit A-7 for identification.

Q. Handing you what has been marked as Defendants' Exhibit A-7 I will ask if you can identify these?

A. These are some of the filter papers that I have put between two pieces of glass just in case somebody wanted to see them.

Q. Well, are these the slides?

A. These are some of the slides, yes, that were made.

Q. Is it possible to retain and preserve these slides for any length of time? A. Certainly.

Q. How would you do that?

(Testimony of John Spinelli.)

A. Well, there are a couple of ways you could do it. I have put them in these, between two (2) pieces of glass, is one way. It probably isn't the most satisfactory way. You [360] could put them in a petri dish and preserve them that way.

Q. Over what period of time could they be preserved?

A. I could say indefinitely because insect fragments won't decompose.

Q. Years?

A. Years. You could remove your fragments and mount them on a slide.

Q. Now, these are the actual slides that you took?

A. Yes, these are the actual slides I have made, yes.

Q. Can you pick out one of those slides and refer to your analyses and reports and pick out one on which there was some fragment on that you found?

A. I haven't bothered to mark these. I think I marked one. No, I didn't. I can't pick out an insect fragment without a microscope, but probably some of these are insect fragments here (indicating a slide). You can't positively make an identification by just looking at them because they are similar. Without a microscope some of these things appear similar. Now, take a look at all the dots on that thing (indicating a slide). You couldn't pick out anything and say it was an insect fragment, but some——

(Testimony of John Spinelli.)

Q. One is marked on the back by the figure eight (8).

A. Yes, I haven't my notebook and am not positive that I could correlate it with——

Mr. Yothers: I will offer these in [361] evidence.

Mr. Sager: I have no objection.

The Court: They will be received.

(Defendants' Exhibit A-7 marked for identification and admitted in evidence.)

Q. Mr. Spinelli, you referred to the nature of the product. What is the nature of the product you had under analysis at this time, I mean, insofar as your determination of filth?

A. I had a product made from wheat, flour and semolina. That is what I mean by nature.

Q. Well in so far as relationship to presence or absence of insect fragments, what is the nature of the product?

A. Well, I would expect to find some insect fragments in any product made out of wheat.

Q. And where the product is made from semolina, would that have any bearing on it?

A. Not from experience, but from what I have read on the manufacture of semolina—I have never been to a mill where they make semolina, but I understand it is screened through a very much rougher type of a screen than flour. Flour is bolted through silk and I would say it would be possible to obtain insect fragments. Mills aren't entirely free of in-

(Testimony of John Spinelli.)

sect fragments, very few of them are, so if you are going to make a product out of something that has the possibility of [362] some insect fragments there, I don't see how you would be too astounded if you found insect fragments in your finished product. There is no attempt in the manufacture of macaroni to rescreen any of these semolina—in other words, it is taken and made directly into macaroni. I think I am right there.

* * *

Cross-Examination

By Mr. Sager:

Q. You say you expect to find insect fragments in any product made from wheat? Do I understand that, Mr. Spinelli?

A. Yes, I would expect to find them, yes. I am not saying I can go out and find them all the time. In other words, if I went out and bought a loaf of bread or something like that, it is possible that there might be some insect fragments there, yes.

Q. It is a fact that in a number of these flour samples here you found no contamination?

A. That is true.

Q. About half of what you examined?

A. That is true.

Q. So, at least fifty per cent (50%) of the flour that was taken from this basement had no contamination whatever that you could discover? [363]

A. That is true, but I believe you will find that macaroni is—there is very little flour used in the manufacture of macaroni. It is mostly semolina.

(Testimony of John Spinelli.)

Q. Aren't some of these samples in which you found no contamination semolina?

A. Probably one or two (1 or 2), yes, sir.

Q. These slides that are marked here as defendants' Exhibit A-7, do you know whether they were—I understand from you that they are the papers resulting from your analyses of these various samples?

A. That is right.

Q. Do you have them identified so you know which sample they are from?

A. I believe on the back you will find a number.

Q. Are they from the sample of the finished macaroni product? A. Some of them, yes.

Q. Are some of them semolina or flour?

A. From both.

Q. They don't show all the samples you took?

A. No, they don't.

Q. You say you can't identify these insect fragments at any time without a microscope?

A. I beg pardon?

Q. Do I understand that you can't [364] identify these insect fragments under any conditions without a microscope?

A. No, I wouldn't make an attempt to identify insect fragments without a microscope unless it was so large that I could say yes, that looks like an insect head or an insect leg or something like that.

Q. Well, if you had the entire capsule of a larva could you identify that? A. Absolutely.

Q. If I understand you correctly, all the analy-

(Testimony of John Spinelli.)

ses that you made were composites of the total sample? A. That was correct.

Q. That is true of the finished product as well as of the flour and semolina samples?

A. That is true.

Q. You made no individual analyses of any one of these sub samples?

A. No. I can give you a reason for that.

Q. That is the fact, that you didn't?

A. That is the fact, yes. For example, out of this one I took two (2) subs and took approximately a hundred fifteen grams (115 gm.) out of each sub to make an official sample.

Q. This sample that you say showed some mold, is that the one you didn't bring down?

A. That is right.

Q. Was that the reason for your not [365] bringing it in because of it?

A. It wasn't in good condition. I didn't bring it in. I have it.

Q. The mold that you observed, of course, would have no effect upon absence or presence of the insect fragments?

A. I wouldn't say that because mold to me indicates in a product like that, might indicate some excess moisture, but I can't answer that question positively. I wouldn't attempt to answer it positively because I am not sure.

Q. Well, mold is not the result of insect fragments?

(Testimony of John Spinelli.)

A. Oh, no, the mold is not the result of insect fragments, no.

Q. And the insect fragments are not the result of mold? A. No, absolutely no.

Q. So, you would find the same number of insect fragments in there, whether it was moldy or not moldy? A. That is right, that is right.

Q. I understood in making an analysis of the whole food you used two hundred twenty-five grams (225 gm.) so that actually what you have here is one (1) analysis of two hundred twenty-five grams (225 gm.) from five (5) different samples?

A. Right.

Q. And altogether you had how many of [366] those sub samples?

A. Individual samples, you want me to give the total number?

Q. That is right, yes. A. Thirty-two (32).

Q. In other words, you were supplied with thirty-two (32) samples and you made analyses from five (5) of them?

A. That is right. I was supplied with these samples on the 24th.

Q. I am not criticizing your effort, Mr. Spinelli. You stated, I believe, that in making analyses of the flour and semolina you used one hundred grams (100 gm.). Is that in accordance with——

A. No, fifty grams (50 gm.) in accordance with the rules. I doubled my samples and doubled everything accordingly.

Q. Well, do you know the reason for the stand-

(Testimony of John Spinelli.)

ard process prescribing fifty grams (50 gm.) for flour or semolina as against two hundred twenty-five grams (225 gm.) for the finished food?

A. The reason for that?

Q. Yes.

A. I imagine it is to facilitate digestion.

Q. Well, you mean that the flour and semolina is harder to digest in bulk than is the finished product?

A. No, it is not harder to digest. The [367] method for flour is somewhat different than the method for macaroni products. In other words, when you analyze flour you are just using a pancreatin without hydrochloric acid treatment.

Q. Well, but the standard process provides or prescribes the use of fifty grams (50 gm.) for flour and semolina and you used a hundred (100) so you didn't follow the prescribed standard?

A. I followed the prescribed standard in this way, that I used the method and my result would not be altered, whether I used fifty (50) or a hundred grams (100 gm.).

Q. Well, the reason that they prescribe fifty grams (50 gm.) rather than a hundred (100) is because of difficulty in the digestive process? In other words, I assume that, and since they prescribed two hundred twenty-five grams (225 gm.) for the finished product, that that digests easier than the flour or semolina, is that correct?

A. Well, that is correct. However, if you double your amount of pancreatin you can obtain just as

(Testimony of John Spinelli.)

good a digest on a hundred grams (100 gm.) as you can on fifty grams (50 gm.).

Q. Could you obtain the same degree of digestion on two hundred twenty-five grams (225 gm.)?

A. If I was using straight flour?

Q. Yes. A. I would say probably. [368]

Q. And could you with five hundred grams (500 gm.)?

A. I wouldn't make an attempt to analyze five hundred grams (500 gm.) in one beaker. I'd use several subs.

Q. You feel that you could use two hundred twenty-five grams (225 gm.) of the flour and semolina, the same quantity that is prescribed for the finished product and obtain equally as accurate results as with the fifty (50) that is prescribed?

A. Now are you talking about the same thing or are you talking about spaghetti in one case and semolina in another case, or semolina in all cases?

Q. My question is, you feel that you could use two hundred twenty-five (225)—you used two hundred twenty-five grams (225 gm.) for the spaghetti?

A. That is right.

Q. Is it your statement that you could use two hundred twenty-five grams (225 gm.) of semolina or flour and accomplish as accurate results as by using fifty grams (50 gm.) of semolina or flour?

A. Well, I haven't made any attempt to do that but I would say I could in the case of semolina.

Q. But not in the flour?

A. Not the flour, I don't think.

(Testimony of John Spinelli.)

Q. In semolina there would be no difference between——

A. You see, well, semolina is just the type [369] of product you have, would make a little difference, more granular and doesn't tend to glum up you might say, as flour would.

Q. When did you graduate or receive your degree, Mr. Spinelli? A. 1949.

Q. 1949? A. Yes.

Q. You received a degree in chemistry?

A. I received a degree in Bachelor of Science.

Q. In chemistry?

A. No, not in chemistry. I majored in chemistry.

Q. What is your degree in?

A. I have a Bachelor of Science Degree.

Q. In any particular subject or——

A. No.

Q. You have been working with this same concern since then?

A. I have been working with this concern since July, 1949.

Q. You worked there part time while you were in school?

A. No, I worked there full time. I had eight (8) credits that I needed in order to get my degree and I could have taken those——

Q. You worked full time the last year you [370] were in school, is that correct? A. Yes.

Q. That is the Food and Chemical Research?

A. Food, Chemical and Research Laboratories.

(Testimony of John Spinelli.)

Q. They are commercial chemical analysts; is that their business?

A. Yes, we do consulting work and development work and analyses.

Q. Do you work on analyses of other products than food? A. Yes.

Q. What portion of your work is food analyses?

A. About fifty per cent (50%).

Q. You have analyzed other macaroni and spaghetti products than this one? A. I have.

Q. How many would you say?

A. Oh, since I have been there I probably analyzed about, made forty (40) determinations on spaghetti and macaroni.

* * *

A. (Continuing): On flour and macaroni products probably forty (40). It could be a little more. I don't think any less.

Q. In that do you include each sample as [371] one examination

A. Each sample as one (1) analysis.

Q. Were all of those forty (40) analyses for filth or were they for—— A. Filth.

Q. In your analyses do you make food analyses for other purposes than determination of filth?

A. Yes, we do.

Q. So that part of your analyses of food products is for other purposes than determination of filth? A. That is right.

(Testimony of John Spinelli.)

Redirect Examination

By Mr. Yothers:

Q. Mr. Spinelli, you indicated all analyses made were composites. Why were they composites, sir?

A. Because of limited time mostly.

Q. Would that make any change or any difference in the results obtained in the fact that you used composites?

A. Yes. If I had analyzed each sample individually the count may have varied up and down. You can't tell. I have no way of knowing unless I analyzed them all individually how the count might have varied. I have a fairly good cross section here.

Q. Your composites then were a cross section, an average as it were, is that correct?

A. That is right.

Q. By the way, Mr. Spinelli, taking the same sample and under the same laboratory conditions, would two (2) anaylsts analyzing the same sample arrive at the same result?

A. They would arrive at approximately the same result. For example, if I had a count of five (5), another analyst wouldn't necessarily get a count of five (5). He might get a count of eight (8) or three (3).

Q. And that is due to what, sir?

A. Well, distribution of insect fragments in macaroni products is anything but uniform.

(Testimony of John Spinelli.)

Recross-Examination

By Mr. Sager:

Q. An analysis of each of these subsamples which you composited could easily show a range of fragments from two (2) to three (3) up as high as seventeen (17), couldn't they?

A. From my results?

Q. No, I mean the analysis, separate analysis of each of the sub samples. If another analyst [373] found—you wouldn't question his findings if he found as high as seventeen (17) fragments in any one of those samples?

A. I wouldn't question another analyst's findings. As a general rule we don't unless there is——

* * *

Q. (Continuing): I never question another analyst's findings if I know that he is capable of doing these analyses. We have had, on occasion, to refer certain cases in our laboratory and we don't question their analyses?

Q. Did you find any moth scales in any of your analyses?

A. On one I believe I found what appeared to be a moth scale, yes.

Q. Just on one?

A. Part of a moth, yes.

Q. You recognize moth scales, do you, Mr. Spinelli? A. Oh, yes.

Q. You couldn't confuse those with the wheat hull?

(Testimony of John Spinelli.)

A. No, not—I don't believe you could confuse a moth scale. You have color there and bits of hair. No, you couldn't.

Q. By the way, these moth scales, that is the powdery stuff that comes off on your fingers if you pick up a moth, isn't it?

A. No, that isn't my interpretation of a [374] moth scale, no.

Q. What is a moth scale?

A. Well, moth scale is just merely a part of the moth that might slip off, a scaly portion of your moth, probably body part, and I don't see how you could identify a powdery substance as a moth.

Q. You don't think it is that powdery substance that comes off a moth? A. No.

Q. Your digestion in this analysis digests some part of the insect fragments or contamination of the product doesn't it?

A. Probably the internal parts. It wouldn't digest the casings or the wings or, you might say, head, legs, stuff like that it wouldn't digest.

Q. But the softer tissues of the larva or the moth, they are digested along with it?

A. They might be digested, the internal parts. I mean, if you pulled out a larva you probably wouldn't find much left of the insides. You might have just a casing.

Q. And, of course, eggs, they are digested, are they not?

A. No. It is possible to pull eggs out, to float eggs out. As a general rule you don't do that. You

(Testimony of John Spinelli.)

make—if you are looking for insect eggs you would use something [375] different altogether.

Q. You'd use different process?

A. You would use a different process you mean? Yes.

Q. Well, the reason is this process wouldn't bring them out, isn't it?

A. No, this is not a good process for bringing out insect eggs.

Q. That is what I say.

A. That is right, yes.

Q. Your analysis here wouldn't have disclosed normally insect eggs?

A. No, it wouldn't disclose insect eggs, no.

Q. Can you tell the difference between these fragments, if it is a fragment of a larva or a moth in the adult stage?

A. If you have a certain part you might be able to. In other words, if you had a wing part, if you had a body part, you might tell by color. In other words, you might find a beetle part. They are pretty easy to identify by their color. They are brown and they are quite readily identifiable, and other insect fragments such as a moth would be. You can distinguish——

Q. Well, in your analyses here you didn't find any beetle parts, did you? A. Yes, I did.

Q. Is that what these fragments are that [376] you found?

A. Some are beetle parts, yes.

Q. You can distinguish moth particles also?

(Testimony of John Spinelli.)

A. I didn't distinguish my fragments between species, if that is what you are driving at.

Q. Well, are you able to say whether they were moth fragments or larva fragments?

A. Yes, I believe in one of my samples I did specifically mention that I had some larva parts.

Q. Well, would that be a moth larva or some other larva, or could you say?

A. It could be a moth larva. [377]

* * *

The Court: You may proceed.

MORRIS J. HUBERT

being first duly sworn on oath was called as a witness on behalf of the defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. Will you state your full name?

A. Morris J. Hubert.

Q. How do you spell your last name?

A. H-u-b-e-r-t.

Q. What is your address, sir?

A. Route 1, Box 985, Kent, Washington.

Q. And where are you employed, sir?

A. The Quartermaster Corps, Inspection Division, United States Army.

Q. How long have you been so engaged, sir?

A. Three (3) years.

Q. What are your duties, sir?

(Testimony of Morris J. Hubert.)

A. Well, my duties consist of going in a plant and sampling the end items and checking the markings and packaging on the products.

Q. And in May, April, May and June of 1951, did you have occasion to be present in the Golden Grain Macaroni plant here in the city of Seattle?

A. Yes, on many occasions. [378]

Q. On approximately how many occasions, sir?

A. Oh, six (6) or seven (7) times approximately.

Q. That was in line of your duty as Inspection Corps of the Quartermaster part of the Army?

A. Yes.

Q. Did they have a contract to purchase macaroni from Mr. Dedomenico at that time?

A. Yes.

Q. Do you know approximately how much macaroni was sold to the Army in that period of time?

A. Well, approximately three hundred thousand pounds (300,000 Lbs.).

Q. And did you draw the samples yourself?

A. Yes.

Q. What did you do with those samples?

A. I submitted a composite sample to the Sixth Army Laboratory here in Seattle and another composite to our Chicago laboratory, and a portion of this sample was also turned over to the contractor who in turn submits it to a commercial laboratory for an analysis.

Q. So that the sample you take, as I understand it, is divided into three portions, one given to commercial laboratory, one to the Sixth Army and one

(Testimony of Morris J. Hubert.)

in Chicago, is that right? A. Yes. [379]

Q. After those analyses are made is there—what is done with the samples?

A. Well, the samples, I don't know what happens to the samples after the laboratory gets through with them. We just get a report on the analyses.

Q. And do you have your records and reports of those?

A. We keep those records for six (6) months only and then they are destroyed.

Q. So that you do not have any records at all?

A. No, sir.

Q. Do you know what the results of the analyses were?

A. Well, I can't give any figures. They evidently were all correct or we wouldn't have passed——

Mr. Sager: Just a moment. I object to that answer, your Honor.

The Court: Objection sustained, it may go out.

Q. Well, were any of the products rejected by you or by the analyst? A. No, I——

Mr. Sager: I object to that also, your Honor.

The Court: I will overrule——

Mr. Sager: He can testify as to whether he rejected any but——

The Court: Do you know of your own knowledge [380] whether or not any were rejected?

The Witness: No, sir, I don't.

The Court: The answer may go out.

Q. Mr. Hubert, in the period of time you were

(Testimony of Morris J. Hubert.)

in the Golden Grain Manufacturing plant in April, May, June of 1951, can you state whether or not as a result of those visits and inspections at the Golden Grain Manufacturing plant, it was clean, sanitary, unclean or unsanitary?

Mr. Sager: I object to that, your Honor. It calls for a conclusion of this witness.

The Court: He has testified he was there on many occasions. He can testify as to what his observation was, if he made any observation of it.

Q. (Continuing): What did you observe as to the sanitary conditions during the period of time you were there?

A. I would say the conditions were sanitary.

Q. Did you look at the plant with that in mind?

A. No, sir, I am not employed in a capacity of a sanitary inspector. This was just a personal observation.

The Court: You didn't make any particular point to observe its cleanliness or lack of it, did you?

The Witness: Well, we always look around in a plant when we go in and if we find something outstandingly bad we have to report it, but [381] otherwise unless it is brought to our attention in that way we make no reports on anything.

The Court: Did you make an inspection with that in mind to determine whether or not there was anything outstandingly wrong?

The Witness: No, sir.

Q. You didn't observe——

Mr. Sager: Just a moment. I move that his an-

(Testimony of Morris J. Hubert.)

swer that as far as he observed, or whatever it was, that the place was sanitary, that that be stricken.

The Court: The motion is granted and stricken from the record.

Q. (Continuing): Will you state whether or not you observed anything that was unsanitary then? A. No.

Q. Did you observe the general condition of the equipment and of the employees and of the employees' uniforms at that time? A. Yes.

Q. Well, state whether or not they were sanitary or unsanitary? A. They were very clean.

* * *

Cross-Examination

By Mr. Sager:

Q. Do you know just what dates you were there, Mr. Hubert?

A. No, sir, not having any records I have no way of stating definitely.

Q. Do you know for sure what months you were there? A. I was there in May and June.

Q. You don't know what date though in June or May? A. No, sir.

Q. Your statement that the uniforms looked clean, you refer to the uniforms of the employees?

A. Pardon?

Q. You refer to the employees, the uniforms of the employees that they were wearing when you say that they looked clean? A. Yes.

Q. You made no examination of the machinery, did you? A. No.

(Testimony of Morris J. Hubert.)

Redirect Examination

By Mr. Yothers:

Q. Did you recall whether or not June 19th of 1951 you were present in the plant? [383]

The Court: I can't hear you.

Q. (Continuing): Do you recall whether on June 19th you were present in the plant, Mr. Hubert?

A. Well, I can't say definitely. I was in and out of the plant many times in June.

Q. See whether or not that would refresh your recollection as to the dates you were in the plant of Golden Grain Macaroni Company (passing the witness a document). A. 25th of June.

Q. What was the date? A. 25th of June.

Q. This is a certificate of quality and condition for subsistence? A. Yes, sir.

* * *

Q. (Continuing): Handing you what has been marked as defendants' Exhibit A-8 and A-9 I will ask if you can [384] identify these?

A. A certificate of quality and condition for subsistence items.

Q. What is the general nature—how are they prepared, and——

A. They are prepared by our office after we receive the results of the laboratory analyses inasmuch as the end item is concerned, the product, and also

(Testimony of Morris J. Hubert.)

to give it, make the statement that the packaging——

Mr. Sager: Just a moment. I object to his stating what the exhibit shows.

The Court: Objection sustained.

Q. Are they part of the official records?

A. Yes.

Q. Is this a copy of the record that you refer to that has been destroyed by your office?

A. Yes.

Mr. Yothers: I will offer these in evidence.

Mr. Sager: May I inquire? Did you bring these records with you?

The Witness: No, sir.

Mr. Sager: Are they kept in your control or custody?

The Witness: No, we have no records.

Mr. Sager: These are not records [385] then from your office?

The Witness: They are copies that were submitted to the contractor. So many copies are made in duplicates and forwarded to the consignee, and the contractor.

Mr. Sager: Are any of these signed by you?

The Witness: Yes. No, they are not. I wasn't authorized to sign them at the time.

Mr. Sager: These are not any part of the records of the Army then?

The Witness: Yes, they are.

Mr. Sager: These are?

The Witness: Yes.

(Testimony of Morris J. Hubert.)

Mr. Sager: They come from the Army?

The Witness: Yes, they are duplicate copies sent out.

Mr. Sager: I mean they are not from your office now?

The Witness: Not right now, no.

Mr. Sager: You have nothing to do with the keeping of these records?

The Witness: No, sir.

Mr. Sager: I will object to them on that ground. They are not properly identified.

The Court: As I understand it, the [386] only purpose of your seeking to admit these in evidence is to indicate the time that this man was present, is that right?

Mr. Yothers: No, the purpose is for the matters contained in the exhibits themselves, your Honor, part of the official records, I think, kept in it. The originals, as the witness testified, have been destroyed. He has identified them as carbon copies which have been furnished.

The Court: Nothing in these so-called records which throw any light upon this case. It is merely a certification that the bill is correct and payment therefor has not been received. Contains information that the monies due under this contract have been assigned to the Seattle First National Bank in Seattle. It indicates the character of the contract. Other than that it doesn't throw any light upon this case except that certain tests were made and the results, that it was free from filth. With that in

(Testimony of Morris J. Hubert.)

mind—I just noticed that—I will receive them in evidence for what they may be worth.

(Defendants' Exhibits Nos. A-8 and A-9 marked for identification and admitted in evidence.) [387]

* * *

SWAIN ODDSON

being first duly sworn on oath, was called as a witness on behalf of the defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. State your full name please, sir.

A. Swain Oddson.

Q. Where do you live, Mr. Oddson?

A. 1906 East 80th Street, Seattle.

Q. What is your occupation, sir?

A. I am with the Sixth Area Corps for the Seattle office of the Quartermaster Corps Inspection Service.

Q. And what are your duties, sir?

A. As a general supervisor of inspectors assigned to the Seattle field and, in other words, general supervision as a head of the Seattle office.

Q. In May and June of 1951 did the Army have a contract with Mr. Dedomenico for products?

A. Yes they did.

Q. Did you have occasion to exercise your duties and responsibilities as the coordinator of the Quartermaster Inspection Corps relative to that product

(Testimony of Swain Oddson.)

purchased from the Golden Grain Manufacturing Company?

A. I didn't quite understand, I am sorry.

Q. During the period of time of June, June of 1951, [389] did you have occasion to exercise your duties and responsibilities as the coordinator of the Quartermaster Inspection Corps relative to this contract? A. Yes, sir.

Q. And were samples taken? A. Yes, sir.

Q. And were they taken under your direction and supervision?

A. Yes, I assigned the inspector to the contract.

Q. And did you—was Mr. Hubert one of the inspectors that you assigned? A. Yes, sir.

Q. Did they have—did the inspectors have occasion to inspect the plant of the Golden Grain Manufacturing Company?

A. Well, in general observation of the plant as was stated. We are not qualified sanitary inspectors, but we do make a general observation.

Q. And did they, during that period of time of June of 1951, did they make those inspections?

A. They are supposed to.

Q. Well, do you know whether or not they did?

A. No, I don't know that.

Q. And do you know of your own knowledge whether or not any of the products purchased under the contract were, [390] was rejected during this period of time May or June?

A. As I recall, the samples drawn by the Army were not, there was no rejections.

(Testimony of Swain Oddson.)

Q. And what was the total amount that they contracted, do you recall?

A. I believe it was around three hundred thousand pounds (300,000 Lbs.).

Q. Was there a later contract also of three hundred thousand pounds (300,000 Lbs.) for a total of six hundred thousand pounds (600,000 Lbs.)?

A. You mean during that same period?

Q. Yes, wasn't there a total of six hundred thousand pounds (600,000 Lbs.)?

A. Well, I don't recall the exact figure, but there were additional contracts. [391]

* * *

WILLIAM J. CARR

being first duly sworn on oath, was called as a witness on behalf of the defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. State your full name.

A. William J. Carr.

Q. What is your address, Mr. Carr?

A. 11530 Evanston Avenue.

Q. Seattle?

A. Seattle, 33, yes.

Q. What is your occupation, sir?

A. I am Chief Chemist of the Seattle Branch of the Sixth Area Army Medical Laboratory.

Q. Have you had occasion, sir, to make analyses

(Testimony of William J. Carr.)

of macaroni and food products in the course of your duties? A. Yes, sir.

Q. How long have you been Chief Chemist or engaged in that business and profession?

A. Since 1939.

Q. How many samples of macaroni and flour products have you run during that period of time from 1939?

A. I have supervised or run approximately two hundred (200).

Q. Did you have occasion, sir, to run samples of the [392] macaroni purchased by the Army under the contract with Golden Grain Manufacturing Company? A. I did, sir.

Q. 1951? A. Yes, sir.

Q. And how many analyses did you make in that period of time?

A. I believe there were six (6) samples brought to the laboratory.

Q. And did you make tests of those?

A. Yes, sir.

Q. What is your background, training and education, Mr. Carr?

A. I have a Bachelor of Science degree in biology and sciences from Seattle University. I have thirty-five (35) hours of post-graduate work in bacteriology and chemistry from the University of Washington. I have since 1943, been Chief Chemist for the Sixth Army Area Medical Laboratory at Seattle. Prior to that I had two (2) years as Assistant Chief Field Inspector for Food for the

(Testimony of William J. Carr.)

Army. Prior to that I had two (2) years Assistant Chief Chemist for Libby, McNeill & Libby, Portland office.

Q. Have you had occasion, sir, to make tests on Pure Food and Drug Administration for so-called filth tests? A. Yes, sir. [393]

Q. Are you familiar with the procedures and techniques used in those? A. Yes, sir.

Q. Mr. Carr, assuming that we had a three pound (3 Lb.) sample of macaroni, of a macaroni product, cut macaroni, and a contamination filth test was run on the sample in accordance with the accepted procedures as set forth under the Pure Food and Drug Administration, and in that sample there were five (5) insect fragments, and in another portion there were nine (9) insect fragments, and in another portion there were ten (10) insect fragments and in another portion fourteen (14) insect fragments, and in a sixth portion eight (8) insect fragments, for a total of sixty-two (62) insect fragments in six (6) portions of samples, an average of ten and one-third (10⅓) insect fragments per portion, state whether or not in your opinion that would constitute filth?

Mr. Sager: I object to that, your Honor.

The Court: Overruled.

A. I am examining these six (6) samples for the Army?

Q. Yes.

A. According to Pure Food and Drug Regulations we would accept them.

(Testimony of William J. Carr.)

Mr. Sager: If your Honor please, I move that that be stricken.

The Court: The answer may go out. [394]

Q. Whether or not in your opinion that would be filth, sir?

A. In examining for the Army——

The Court: Answer the question. Does that constitute filth in your opinion?

The Witness: Am I allowed yes or no, your Honor?

The Court: Yes.

A. Yes.

Q. And in assuming, sir, that you had another sample—did you say your answer was yes?

A. The question was, is it filth. I am only allowed yes or no. My answer is yes.

Mr. Yothers: Your Honor, I claim surprise and ask permission that I be permitted to ask this witness some leading questions.

The Court: All right, go ahead.

Q. Mr. Carr, did you not state to me in answer to the same question that I asked you previously yesterday and again this morning that in such a situation that would not constitute in your opinion filth?

A. You are right, but I started to qualify my questions. At the time I was talking to you, sir, we were discussing Army products. The question as I understood it was relative to Pure Food and Drug regulations. [395]

The Court: Is there a difference?

(Testimony of William J. Carr.)

The Witness: Well, your Honor, we have an administrative tolerance of which I have not received permission to divulge. Under certain circumstances, depending on a product, certain amount, in this case insect fragments, may be found and the product still found acceptable to the Army.

Q. Well, the presence of insect fragments, ten (10) insect fragments to a portion, did you not state that that would not, in your opinion, constitute filth? A. That is right.

Q. And is that your testimony now?

A. That is right.

Q. So that if there is not in excess of ten (10) insect fragments per sample, the average on a sample, in your opinion it would not constitute filth, is that correct? A. Yes, sir.

* * *

Cross-Examination

By Mr. Sager:

Q. I understand your last answer is it would constitute filth? A. Would not.

Q. In other words, what you are basing your answer on is that the tolerance of the [396] Army allows?

A. Yes, I am basing that answer entirely upon that.

Q. And you are not attempting to express an opinion as to what actually constitutes filth under the Food Act? A. No, sir. [397]

DR. PAUL V. GUSTAFSON

being first duly sworn on oath, was called as a witness on behalf of the Defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. State your name please, Doctor.

A. Paul V. Gustafson.

Q. And where do you reside?

A. The street address?

Q. Yes. A. 19345-47th N.E., Seattle.

Q. And are you a doctor of medicine, sir?

A. Yes, sir.

Q. And where do you practice or have been practicing?

A. I teach in the University Medical School.

Q. What do you teach, sir?

A. I teach in the microbiology department. My chief responsibility is paracitology.

Q. What is that?

A. That is the realm of medical problems concerned with animal causitive agents. Includes very tiny ones, the worm group and some arthropod groups.

Q. And where did you receive your degree? Briefly outline your qualifications and background, sir.

A. Medical degree from the University of [398] Chicago, PH degree from University of Illinois. That was in zoology.

(Testimony of Dr. Paul V. Gustafson.)

Q. How long have you been at the University Medical school?

A. I think I am in my fifth year, since 1948.

Q. Do you happen to deal with the question and problems of the effect of microscopic organisms and animals, insects on human life and health? Is that included in your studies?

A. The direct effect of such fragments on human health, I don't believe so. That isn't a part of my work. The effect of living insects or other animal products, living products on human health, is in my realm, yes.

Q. And, Doctor, are you familiar generally with the processes and procedures of preparation and use and consumption of macaroni and spaghetti and other products of that nature?

A. The processing for sale to the consumer or processing before eating?

Q. Before eating, the use of it?

A. I have cooked spaghetti.

Q. And, Doctor, assuming that you have a half a pound (½ lb.) of spaghetti and that in that half pound (½ lb.) of spaghetti there was as much as twenty-two (22) insect fragments, moth scales and a capsule identified in size under the microscope roughly represents four and four-tenths (4.4) [399] parts per million by volume, state whether or not in your opinion that would be filthy?

Mr. Sager: I object to that, your Honor.

The Court: Let him answer.

A. I can't see how that would be called filthy.

(Testimony of Dr. Paul V. Gustafson.)

Q. And would that have any effect, sir, on the health——

Mr. Sager: I object to that because the question of whether or not the product is injurious to health is wholly immaterial.

The Court: Objection sustained.

* * *

Cross-Examination

By Mr. Sager:

Q. Doctor, if you had an opportunity to choose between a product containing the amount of insect contamination that counsel stated in his question to you, and one which was free, which would you choose?

Mr. Yothers: I object to that, your Honor. I don't think that is material.

The Court: I think the answer would be obvious. He would choose the one free from contamination. You don't have to answer that question. [400]

* * *

MURIEL DEDOMENICO

being first duly sworn on oath was called as a witness on behalf of the defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. Will you state your full name, please?

A. Muriel Dedomenico.

Q. Where do you live?

(Testimony of Muriel Dedomenico.)

A. 6014 Lake Shore Drive.

Q. Are you related to Paskey Dedomenico?

A. By marriage.

Q. And how long have you been married?

A. Twenty-one and a half (21½) years.

Q. Have you any children? A. Three (3).

Q. Are you an officer or stockholder in the Golden Grain Macaroni Company?

A. I am a director.

Q. Member of the Board of Directors?

A. Yes.

Q. How long have you so served?

A. Five (5) or six (6) years, I believe.

Q. And were you such in June and July of 1951? A. Yes.

Q. Do you recall where Mr. Dedomenico was in July [401] of 1951?

A. Yes, he was in San Leandro.

Q. He was not present here in Seattle?

A. No, sir.

Q. Do you know when he left?

A. I don't know the exact date. It was around the first of July.

Q. And how long was he down there?

A. Well, he was gone until about the 26th of July.

Q. Mrs. Dedomenico, are you familiar with the manufacturing processes of the Golden Grain Manufacturing Company? A. Yes, sir.

Q. Have you been in the plant? A. Often.

Q. Were you in the plant during the period of

(Testimony of Muriel Dedomenico.)

time June and July of 1951? A. Yes.

Q. And how many times were you in the plant?

A. That would be hard for me to answer. I don't keep a diary.

Q. Well, was it several times, a few times, or——

A. Let's say two (2) or three (3) times.

Q. And did you go through it, up on the second floor where the manufacturing processes are?

A. I may have, I can't remember that far back. [402]

Q. When you were in the plant in June and July of 1951, did you make any determination or inspection to determine the general conditions as to sanitation and cleanliness of the plant during those times? A. I always look around, yes.

Q. How was it at that time?

A. Everything looked all right to me.

Q. Well, was it clean or unclean?

A. It was clean, yes.

Q. Was it sanitary or unsanitary?

Mr. Sager: I don't think she is qualified to answer that, your Honor.

The Court: Objection sustained.

Q. (Continuing): Did you observe anything during those times, Mrs. Dedomenico that—I will withdraw that, I guess it is the same question. During the period of time you have been married to Mr. Dedomenico have you had occasion to visit other macaroni plants? A. Yes, sir.

Q. Approximately how many?

A. Oh, I imagine about twenty (20).

(Testimony of Muriel Dedomenico.)

Q. And have those other macaroni visits been over an extended period of time? A. Yes.

Q. Any visitations made in the year 1951 or the last [403] year? A. 1951? I can't remember.

Q. As to general cleanliness and sanitation, how does the plant, Golden Grain plant, compare to the other plants that you and your husband have visited during that period of time?

Mr. Sager: I object to that.

The Court: Objection sustained. I have heretofore ruled on that subject, counsel. I am not deciding this case upon the basis of other comparisons between other macaroni plants.

* * *

(Whereupon, at twelve o'clock noon, a recess was had until two-thirty o'clock p.m., December 5, 1952. [404] In the interim period a visit to the Golden Grain Macaroni Company plant was made as indicated, by the Court, Clerk, Crier, and reporter, also all counsel heretofore noted and defendant Paskey Dedomenico. Upon return court was reconvened at two-thirty o'clock p.m. and said counsel being present the following proceedings were had, to wit:) [405]

PASKEY DEDOMENICO

being first duly sworn on oath, was called as a witness on behalf of himself and the other defendant, and testified as follows:

Direct Examination

By Mr. Yothers:

Q. State your name, please.

A. Paskey Dedomenico.

Q. Where do you live, Mr. Dedomenico?

A. 6014 Lake Shore Drive.

Q. Seattle? A. Seattle, Washington.

Q. How long have you resided there, sir?

A. Eleven (11) years.

Q. Are you married? A. Yes, sir.

Q. Children? A. Three (3) children.

Q. What are their ages?

A. One is eighteen (18), one fifteen (15), two (2) boys, and one (1) girl, eight (8).

Q. And you are the husband of Mrs. Dedomenico that testified just before lunch?

A. Yes, I am.

Q. Did you have any connection with the Golden Grain Macaroni Company? [406]

A. I am the president of the company.

Q. And how long have you been associated with the Golden Grain Manufacturing Company?

A. I have been associated with the Golden Grain Macaroni Company for twenty-four (24) years.

Q. What are your general duties with relationship to the company, sir?

(Testimony of Paskey Dedomenico.)

A. At the present time I am the president of the company and general manager of the Seattle plant.

Q. And in June and July of 1951 what was your relationship to the company?

A. I was president of the corporation and general manager of the Seattle plant.

Q. Mr. Dedomenico, were you present here in Seattle in June and July of 1951?

A. On June 28, 1951, I left for San Francisco.

Q. And when did you return?

A. I returned on July 25th.

Q. You were absent then from the city of Seattle and from the plant here in Seattle during all that time? A. Yes, I was.

Q. Do you have any other employees working for you out there at the plant? A. Yes, I do.

Q. How many employees are there? [407]

A. Oh, I have got approximately fifteen (15) employees working for me out here in Seattle.

Q. And is that same true in June and July of 1951?

A. Well, I think the crew was a little smaller at that time.

Q. In your absence, Mr. Dedomenico, who was in charge of the plant, who is the custodian?

A. Joe Mulvaney is the custodian of the plant.

Q. In Mr. Mulvaney's absence who is in charge of it?

(Testimony of Morris J. Hubert.)
(Testimony of Paskey Dedomenico.)

A. If Mr. Mulvaney is not here he has another there who takes charge of the plant.

Q. And what is his name?

A. Al Whitehead.

Q. And who was in charge of the plant when you left in—during the period of time you were gone in June and July of 1951?

A. I left for San Francisco June 28th. Joe Mulvaney was in charge of the plant.

Q. In what capacity is Mr. McDiarmid employed?

A. Mr. McDiarmid is the sales manager.

Q. Does he have any responsibility or duty with relationship to the plant and the manufacturing and production?

A. No, sir, I have never given Jack McDiarmid any responsibility in regards to the plant whatsoever. [408]

Q. Now, in June and July of 1951 and immediately prior thereto, had any instructions been issued by you to the employees? Did you issue to the employees instructions relative to the procedures they should follow in the manufacturing and production of your products out there particularly with reference to the cleaning procedures and the sanitation and so on?

A. They have always had instructions. The people that work for me have always been told to keep the plant clean. If they notice anything out of order, to report it to the office immediately, and if they couldn't correct the matter, that I would see that it was corrected at once.

(Testimony of Paskey Dedomenico.)

Q. And in your absence who were they to report to?

A. Well, in my absence they reported to Joe Mulvaney.

Q. Well, specifically with reference now to the cleaning process, what instructions had you issued to your employees in, particularly in June and July of 1951, Mr. Dedomenico?

A. Well, in regards to the flour equipment, Joe and I had got in a huddle and we had decided to put the flour equipment on once a month basis of tearing it down for cleaning. That meant a twelve (12) hour job and if he thought that it was necessary, to do it oftener. It was up to him to use his own judgment.

Q. And when was the last time it was cleaned just [409] prior to the time——

A. The flour equipment was cleaned under my supervision on June 25th.

Q. On June 25th. Now, you were present this afternoon, were you not, when we made inspection of the plant out there? A. Yes, I was.

Q. Can you tell us the relationship in terms of cleanliness, compare the plant as it was today and as it was when you left for San Francisco?

A. In my opinion I had the plant cleaner on the day before I left for San Francisco than it was today.

Q. What instructions did you give to the employees with relationship to the number of times

(Testimony of Paskey Dedomenico.)

they were to clean and how often the cleaning was to be done?

A. The employees are cleaning that plant every day.

Q. What do they do? A. They stop——

Q. I am speaking now of June and July of 1951.

A. Well, as you noticed today, there are several departments, a manufacturing department, a packing department, there is a shipping department and a receiving department. The production department clean up after they work.

Q. What do they do? [410]

A. They shut down ahead of time. They clean up, they sweep, they clean the machines, they do everything that is necessary to clean the place. The packing department does the same thing. The shipping department does the same thing.

Q. And those same procedures were followed, sir, in June and July?

A. Yes, they were.

Q. The same procedures have been followed all the time?

A. Yes, those were my instructions.

Q. Did you, immediately prior to the time that you left and when you returned, make an inspection of the plant?

A. Yes, when I got back from my trip I took a walk through the plant.

Q. And did you, is it your customary practice to make your inspections of the plant?

(Testimony of Paskey Dedomenico.)

A. Yes, it is my customary practice to, when I arrive at my plant to walk through the building and back to the office and if I notice anything that is unusual I report it to the man in charge or to that department.

Q. What do you mean by anything unusual, Mr. Dedomenico?

A. Well, let us say that I don't like the way the basement housekeeping is, why I tell Joe and I tell him to straighten it out. If I don't like the shape that the shipping department is in, why I tell them to line it up and [411] straighten it out.

Q. When you walk through the plant do you make an inspection for sanitation?

A. I make a visual inspection, yes I do.

Q. What is the purpose of that, sir?

A. Because I want to run a sanitary plant.

Q. What methods of procedures do you use to, for moth control and for rodent control, and did you use during the period of June and July of 1951?

A. We have had the United States Insecticide Company doing our work for several years. Their man comes in every week and takes care of any rodent problem that the building may have. We also purchase from them their spray material. Now along those lines, at another inspection when Inspector Allen came in and checked the building I asked him if he had any suggestions and Mr. Allen said, "I don't think you are using the proper spray material." I said, "All right, what do you

(Testimony of Paskey Dedomenico.)

suggest?'' So he said, ''I suggest that you call the sanitary engineer over at the Fisher Flouring Mills,'' which after Mr. Allen left our building, I did. I called the sanitary engineer at the Fisher Flouring Mills and he told me—— [412]

* * *

Q. What did you do, not what somebody told you, but what did you do?

A. I purchased the fly spray that Mr. Allen recommended from the United States Insecticide Company and we proceeded to use that.

Q. Is that the two per cent (2%) chlordane spray that—— A. Yes, it is.

Q. Was that used by you during that period in June and July? A. Yes, it was.

Q. And what is the purpose of that, sir?

A. Well, in the twenty-four (24) years I have been in the macaroni business the industry and ourselves have had this moth as a pest that we have always had to keep after, and we use this fly spray or insecticide, whatever you want to call it, to keep the number of moths in our plant down to a minimum.

Q. Mr. Dedomenico, were you present in court when Mr. Mulvaney testified as to the actual methods that they used in cleaning the equipment and everything? [413] A. Yes, I was.

Q. Would your testimony along that line be substantially the same?

A. Yes, yes, just the same.

Q. Tear it down, vacuum it out, paint it and the

(Testimony of Paskey Dedomenico.)

same procedure followed as to the driers and as to the trays? A. Yes.

Q. And that process, as I understand it, is continuous? A. Continuous.

Q. Do it all the time? You are doing part of the plant sometime and part of the plant some other time, is that correct? A. That is right.

Q. On the incoming products of raw material, Mr. Dedomenico, what procedures do you adopt relative to making tests on those?

A. If our men are unloading the cars they have instructions to check the cars and if they notice that there is any insects like moths or anything else, to report it to me at the office that in such and such a car they found one (1) moth or whatever the trouble may be, and I do remember of Al Whitehead reporting to me that he had found a moth on one of the flour sacks at one time.

Q. Well, do you make tests? [414]

A. Yes, I happen to be the buyer for flour for both companies and we do run tests. We run protein and ash and filth tests.

Q. Now there was some testimony with Mr. Shallit relative to the presence of moths and larvae and pupae and webbing in this grinder there in your plant. What can you tell us about the grinder?

A. Well, the grinder that was there in the plant was purchased from the Hunt Fontana Food Company that went out of business in Hayward, California. On one of my trips to San Francisco and San Leandro, why my brother Vincent and I pur-

(Testimony of Paskey Dedomenico.)

chased a continuous automatic unit and this grinder and we had it shipped to the Seattle plant and I was——

Q. Was that grinder in use?

A. The grinder was not in use.

Q. When did you finally put the grinder into use, or is it in use yet?

A. The grinder was not put into use until after July 19th of 1951.

Q. Do you know how long after the 19th it was——

A. Well, I put on my book here—I make memorandum of everything more or less that goes on in the plant and I am looking at this date of July 19th and it was put in use after July 19th.

Q. This United States Insecticide Compay which you [415] refer to, Mr. Dedomenico, how often did they make their weekly inspections and——

A. It is usually every week. Sometimes they lag as long as ten (10) days, but they are supposed to be on a weekly inspection tour.

Q. And what do they do when they come out?

A. Their man comes in and sets bait for rodents and if there is anything that he should tell me, he either writes me a little note or tells it to me personally.

* * *

Cross-Examination

By Mr. Sager:

Q. Mr. Dedomenico, you were present there on July 31st when Mr. Allen and Mr. Shallit came there for the second inspection?

(Testimony of Paskey Dedomenico.)

A. Yes, I was.

Q. They asked your permission to inspect the plant on that occasion? A. Yes, they did.

Q. Did you give them permission?

A. Yes, I gave them permission.

Q. Do I understand you would not have given them permission had you been there on the 19th?

Mr. Yothers: I don't think that is [416] material, your Honor, whether he would or not have given them permission.

The Court: Objection will be overruled.

A. I would have given them permission.

Q. You would have given them permission?

A. Yes.

Q. Well, that is what McDiarmid did according to your understanding, is that correct?

A. I understand Mr. McDiarmid gave them permission in my absence, yes.

Q. And you would have had you been there in his stead?

A. I would have given the inspectors permission to look at the plant, yes, I would have.

Q. You learned after you came back that they had inspected the plant on the 18th and 19th?

A. Yes.

Q. And you also learned that it was with Mr. McDiarmid's permission? A. Yes.

Q. You approved that then, did you?

Mr. Yothers: I object to this, your Honor. I don't think it is material at all.

The Court: The objection will be overruled.

(Testimony of Paskey Dedomenico.)

A. Well, I don't believe that Jack McDiarmid should [417] have given the inspectors permission. In the first place he didn't have no right to. In the second place, he was only the sales manager and in the third place, I never did give him any authority to let anybody in that plant, and in the fourth place everybody in my employ has been told to let nobody in unless I let them in.

Q. Did you tell Mr. McDiarmid that?

A. Yes, he knew that.

Q. Did you object to him having given them permission? A. Yes, I told him that.

Q. You didn't want them to inspect the——

A. Yes, but if I had been there I would have let the boys in.

Q. You were present at this hearing at Mr. Monfore's office, were you?

A. Yes, I was present at that hearing.

Q. Isn't it a fact that at that hearing Mr. McDiarmid said he was the sales manager of the Seattle plant and acts as manager in your absence?

A. No, I think Mr. Monfore got that mixed up. He was the sales manager.

Q. Isn't it a fact——

A. Everything else that is in there Mr. Monfore put it in.

Q. Isn't it a fact that at the close of the hearing [418] Mr. Monfore——

A. No, I don't remember that part of it.

Q. ——Mr. Monfore said, "I asked Mr. Dedomenico and Mr. McDiarmid if the preceding record

(Testimony of Paskey Dedomenico.)

of the hearing as I dictated it represented a true report of the hearing and they agreed that it did."

A. I don't recall that.

Q. You don't recall. Do you recall there was a statement dictated to the stenographer in your presence?

A. I don't remember if it has even been dictated.

Q. You don't remember a stenographer coming into the hearing room and a statement being dictated to her? You don't recall that?

A. He made that up after.

Q. You don't recall her being there?

A. No.

Q. Do you recall Mr. Lofsvold being there?

A. Yes, I remember him now.

Q. This United States Insecticide concern you say that take care of your rodent problem?

A. Yes.

Q. Have you ever had them fumigate your entire plant? A. Yes.

Q. At one time?

A. Yes, they cyanided our place.

Q. When? [419]

A. It has been several years now because we were told that the spray would be just swell for moth conditions.

Q. When you cyanide your plant you have to close it down and lock it up and seal it for a period of twenty (20)—a day or so?

A. Oh, we were advised against cyanide.

(Testimony of Paskey Dedomenico.)

Q. Would you answer that question, please?

A. Would you repeat?

Q. When your plant was fumigated with cyanide that required a complete closing of the plant and sealing of it while it was being cyanided?

A. Yes.

Q. Was that done by this same concern?

A. I don't know about that. I don't know.

Q. You were advised that that would kill everything living in the plant, weren't you?

A. No.

Q. You mean you weren't advised as to that, or you hadn't any information about it?

A. Well, I wasn't advised as to that phase of it.

Q. That is, the fumigation, that was cyanic acid gas? A. It does not kill eggs.

Q. I said it was cyanic acid gas?

A. Yes, it was.

Q. I take it that you are in over-all charge of the [420] Seattle operation? A. Yes, I am.

Q. You are the final authority so far as the Seattle plant is concerned? A. Yes, I am.

Q. And that is true whether it respects the shipping or sales or production department or any of the rest of it? A. Yes.

Q. You spend the major portion of your time at the plant? A. Yes, I do.

Q. Now, you say the employees clean at the end of their production day, in the production department at least? A. Yes.

Q. And you don't mean by that that they go

(Testimony of Paskey Dedomenico.)

into this machinery and take down the machinery every day?

A. Well, they don't tear down the flour equipment every day, but they clean their machines off that they are working from.

Q. But with reference to these conveyors and elevators, you don't mean to say that they are opened every day and cleaned?

A. No the elevators are not cleaned every day.

Q. As I understood, you and Mulvaney agreed that would be done once a month? [421]

A. That is right, or sooner, if necessary.

Q. With respect to Mr. Mulvaney's testimony here the other day, you said that in substance you would testify the same as he did on matters that he testified about.

Mr. Yothers: Well, the cleaning.

Q. (Continuing): Is that correct?

A. Well, I can't recall every word now that Joe Mulvaney said, but with regard to the cleaning and about cleaning up every day and everything he said up here, yes.

Q. Well, would you corroborate his testimony on cross-examination as well as on direct examination? A. Will you repeat that, please?

Q. Would you corroborate his testimony on cross-examination as well as his testimony on direct examination? A. Yes. [422]

* * *

ALFHILD H. REYNOLDS

being first duly sworn on oath, was called as a witness on behalf of the defendants and testified as follows:

Direct Examination

By Mr. Yothers:

Q. Would you state your full name, please, Mrs. Reynolds? A. A-l-f-h-i-l-d H. Reynolds.

Q. Where do you live?

A. 7015 - 24th N.E.

Q. And are you presently employed?

A. No.

Q. Were you formerly employed by the Golden Grain Macaroni Company? A. Yes, I was.

Q. For how long?

A. Well, I went to work for them in September, 1942.

Q. And you worked for them until?

A. April of 1952.

Q. Approximately ten (10) years?

A. Approximately.

Q. You were working for them in June and July of 1951? A. Yes, I was.

Q. Mrs. Reynolds, will you describe the instructions [423] that you received relative to cleaning up and maintenance around the machines you were working on and the other employees at that time in June and July of 1951?

A. Well, we were always told to clean up where we were working after we were—at the end of our day's work.

(Testimony of Alfhild H. Reynolds.)

Q. Clean the machines?

A. To clean the machines and clean our floor, leave everything clean, and if there was any evidence of anything that should not be there, why it was to be reported to the foreman.

Q. And were those procedures followed by you and by the other employees during June and July of 1951? A. They were.

Q. Did you ever receive any instructions or any of the other employees receive instructions to pick up any products off the floor and put them in a bag?

A. Well, we had hog feed bags which we were instructed to place any refuse in.

Q. And during the ten (10) years you worked there, did you ever see thousands of moths there in the plant?

A. I wouldn't say thousands of moths, no. I saw moths but not thousands of them.

Q. In June and July of 1951 did you see any moths during that period of time, or do you recall?

A. Well, I can't say. [424]

* * *

Cross-Examination

By Mr. Sager:

Q. Were you there when the inspectors from the Food and Drug Administration inspected the plant in July of 1951? A. Yes, I was.

Q. Were you on the same floor where they were making the inspection?

A. Well, they inspected both places.

(Testimony of Alfhild H. Reynolds.)

Q. Where were you working at that time?

A. In the shipping department on the first floor.

Q. You weren't upstairs? A. No.

Q. You had no opportunity then to see the material that they gathered during the course of their inspection? A. No.

Q. Now, this cleaning up that you did, that would be at the close of the day after the production was shut down? A. Yes, sir.

Q. And that consisted largely of cleaning the particular machine you were working on, that is, the outside and sweeping up around?

A. Yes. [425]

Q. You didn't go into the machines or take off the covering or anything of that sort?

A. About once a week we did that.

Q. Did you ever participate in the cleaning of these elevators or flour conveying machines?

A. No, I had nothing to do with that.

Q. In June or July of 1951 was any substantial portion of your work on the top floor?

A. No.

Q. You didn't work up there?

A. No, most of my work was on the first floor.

Q. Do you recall whether you ever had the opportunity to observe the cocoons and webbing accumulated on the wall up on the first floor near the flour hopper as shown in this picture?

A. I have seen webbing, yes.

Q. On the wall, on the surface of the wall?

(Testimony of Alfhild H. Reynolds.)

A. I didn't notice any on the surface of the wall, no.

Q. Then you didn't see this particular lot?

A. I can't say that I did.

Q. You observed the cocoons too, did you, that these larvae make? A. Yes, I have seen them.

Q. Around in the equipment and screens and that sort of thing? [426]

A. Yes, I have seen them because I have helped clean.

Q. They were there more or less all the time, were they not?

A. Yes, they are in that type of work.

* * *

Mr. Yothers (Continuing): Your Honor, we have three (3) additional witnesses whose testimony will be substantially the same as Mrs. Reynolds' as to the procedures, instructions they received relative to the cleaning procedures, but counsel has indicated he will stipulate that the testimony would be the same in the interest of saving time. With that stipulation, why we would rest our case.

Mr. Sager: Are they present employees?

Mr. Yothers: Yes, they are.

Mr. Sager: I will agree.

The Court: The Court will accept the stipulation. Any rebuttal? [427]

KATHERINE JOHNSON

being first duly sworn on oath, was called as a rebuttal witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name, please.

A. Katherine Johnson.

Q. Where do you live?

A. Seattle, at 2220 N. 46th.

Q. And by whom are you employed, Miss Johnson?

A. By the Food and Drug Administration.

Q. In the Seattle office? A. Yes, sir.

Q. In what capacity?

A. As stenographer.

Q. Showing you a document that has been identified as plaintiff's Exhibit 8, Mrs. Johnson, do you recognize that? A. Yes, I do.

Q. Did you prepare that? A. Yes, sir.

Q. And at whose dictation?

A. Mr. Monfore's.

Q. And on the occasion when that was dictated to you, do you recall that? [428]

A. Yes, I do.

Q. Who was present at that time?

A. Mr. Monfore, Mr. Dedomenico, Mr. McDiarmid and Mr. Lofsvold, Mr. Monfore's assistant.

Q. And was that dictation given to you in the presence of the four (4) men you have named?

A. Yes, it was.

(Testimony of Katherine Johnson.)

Q. Thereafter did you transcribe your dictation? A. Yes.

Q. Of which this is a copy? A. Yes.

Q. Now, have you had an opportunity to compare your original shorthand notes with a copy of your transcript? A. Yes, I have.

Q. And is this Exhibit 8 a true and accurate copy? A. Yes, it is.

Q. Of the notes, of your stenographic notes taken at that time? A. Yes.

Q. The last paragraph of this, Miss Johnson, reads: "I asked Mr. Dedomenico and Mr. McDiarmid does the proceeding or record of hearing as I have dictated it represent a true report of the hearing, and they agreed that it did." Was that statement dictated to you?

A. Yes, sir. [429]

Q. Likewise in the presence of these same four (4) men? A. Yes.

Q. Do you recall if anything, what was said or done by Mr. Dedomenico or Mr. McDiarmid on that statement?

A. I remember that they agreed that this was a true statement of the hearing.

* * *

Cross-Examination

By Mr. Yothers:

Q. Mrs. Johnson, Mr. Dedomenico and Mr. McDiarmid—Mr. McDiarmid and Mr. Dedomenico did not dictate that to you, did they, but Mr. Monfore?

(Testimony of Katherine Johnson.)

A. That is right.

Q. And you work for Mr. Monfore?

A. Yes, sir.

Q. You were following his instructions as to the transcribing of the notes and everything?

A. I was simply taking his dictation. [430]

* * *

Q. He instructed you to transcribe and prepare this exhibit? A. Yes, sir.

Q. Now, these are not the exact words or statements made by Mr. Dedomenico at all, but they are what Mr. Monfore said was told, isn't that right?

A. Mr. Monfore's dictation, yes.

* * *

Mr. Yothers: Excuse me, your Honor, may I reopen for the purpose of making a motion relative to the testimony again on the grounds originally objected to, the testimony of Mr. Shallit and Mr. Allen that they had no authority or permission to enter into the plant and make the inspection or take and prepare the exhibits? I'd like the record to so show.

The Court: The record will reflect that and the record will also show the objection is again overruled. Take a short recess. [431]

* * *

Mr. Yothers: Motion to dismiss, your Honor, argued as to Paskey Dedomenico, the motion to dismiss will be very brief, your Honor. [432]

* * *

The Court: Under the authorities heretofore cited by the Government upon this point, the motion for dismissal is denied and motion for acquittal is denied. [433]

* * *

The Court: I find the corporation and the individual defendant guilty as to Count 2, guilty as to Count 3, guilty as to Count 4, guilty as to Count 5 and guilty as to Count 6. I find them not guilty on Count 1.

The purpose of these statutes is to see to it that all precautionary steps are taken to prevent situations of this kind. Statutes are to be literally construed in order to prevent the transportation in interstate commerce of decomposed [446] infested or filthy food products.

Now, the corporate defendant as well as the individual defendant should have learned a very bitter experience from what occurred in 1947, the evidence of which is before this Court. They should have exercised the most scrupulous care to avoid this situation. It might not be amiss to make a suggestion that it would be well to employ a man solely for the purpose of guarding against these conditions. They simply did not keep their house in good order.

The evidence of filth is abundant in this case.

Now, I fine the corporation in the sum of Five Thousand Dollars ($5,000.00). I fine Paskey Dedomenico in the sum of Five Thousand Dollars ($5,000.00). And I am willing to entertain a motion for probation in regard to a prison sentence, if you care to make it.

Mr. Yothers: Yes, your Honor, I do so.

The Court: The Court will grant your motion for probation and Mr. Dedomenico, I will place you on probation for a period of three (3) years, during which time it will be necessary for you to report to the probation officer at stated [447] intervals, that you be guided in your future conduct with regard to the operation of your plant by his instructions. Are you willing to accept the terms of that?

Mr. Dedomenico. Yes, your Honor.

* * *

[Endorsed]: Filed February 25, 1953. [448]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS RE MOTION OF DEFENDANTS FOR A NEW TRIAL

Before The Honorable Edward P. Murphy,
United States District Judge.

* * *

January 8, 1953, 9:45 A.M.

Mr. Yothers: Your Honor, by agreement with counsel, so far as the defendant Paskey Dedomenico is concerned, we'd like to consider this as a motion for an acquittal or, in the alternative, a motion for a new trial.

The Court: Let me understand this. I examined the papers casually. Is the motion for a new trial directed to both defendants?

Mr. Yothers: The motion is directed as to both of the defendants.

* * *

The Court: I have considered your arguments. I have listened to them. The case is relatively fresh within my mind and I am satisfied that the Court arrived at a proper decision. Accordingly, the motion for a new trial made on behalf of both defendants is denied.

* * *

[Endorsed]: Filed February 25, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 of the United States Court of Appeals for the Ninth Circuit and Rule 39(b) (1) of the Federal Rules of Criminal Procedure, I am transmitting herewith all the original papers in the file dealing with the above-entitled action, and that said papers constitute the record on appeal from the Judgment against Golden Grain Macaroni Company, Inc., filed Dec. 8, 1952, and from the Judgment, Sentence and Order of

Probation of Paskey Dedomenico, filed Dec. 8, 1952, to the United States Court of Appeals for the Ninth Circuit, said papers being identified as follows:

1. Indictment, filed June 19, 1952.
2. Bond, Paskey Dedomenico, filed July 11, 1952.
3. Marshal's Return on Bench Warrant, Paskey Dedomenico, 2-11-52.
4. Marshal's Return on Summons, filed July 16, 1952.
5. Resolution authorizing Paskey Dedomenico to enter plea of not guilty, filed Aug. 11, 1952.
6. Amended Written Notice to Produce Samples for Independent Analysis, filed Nov. 17, 1952.
7. Affidavit of Robert A. Yothers, filed Nov. 17, 1952.
8. Affidavit of Paskey Dedomenico, filed Nov. 17, 1952.
9. Letter, Food & Drug Adm. to Yothers, dated 11-14-52, filed Nov. 17, 1952.
10. Affidavit of Personal Bias and Prejudice of Judge, filed Nov. 19, 1952.
11. Certification of Counsel of Record, filed Nov. 19, 1952.
12. Letter, Food & Drug Adm. to Yothers, dated 11-20-52, filed Nov. 20, 1952.
13. Motion to Produce Samples, filed Nov. 21, 1952.
14. Order denying application for change of judges, filed 11-22-52.
15. Praecipe of Plaintiff for subpoenas in blank, filed 11-25-52.
16. Waiver of Jury, filed Nov. 28, 1952.

17. Praecipe, defendant, for subpoena, Mulvaney, filed 11-29-52.

18. Praecipes for subpoenas, McDiarmid, et al., behalf defendants, filed Nov. 29, 1952.

19. Praecipe for subpoena by defendants to Custodian of Records, Seattle Health Dept., filed Nov. 29, 1952.

20. Praecipes for subpoena, Floretta, et al., by defendants, filed 12-5-52.

21. Judgment, filed Dec. 8, 1952. (Golden Grain Macaroni Co.)

22. Judgment, Sentence and Order of Probation, filed Dec. 8, 1952, (Paskey Dedomenico).

23. Motion defendants for new trial, filed Dec. 9, 1952.

24. Marshal's Returns on Subpoenas, Kemmard, and 6, filed Dec. 9, 1952.

25. Marshal's Returns on Subpoenas, Gardner, et 2, filed 12-9-52.

26. Court Reporter's Copy of Transcript of Court's Verdict and Sentence, filed Dec. 10, 1952.

27. Marshal's returns on subpoenas, McDiarmid and 5, filed 12-11-52.

28. Marshal's Return on subpoena, Custodian of Records, Seattle Health Department, filed Dec. 11, 1952.

29. Order Denying Motion for New Trial, filed Jan. 13, 1953.

30. Notice of Appeals, by both defendants, filed Jan. 14, 1953.

31. Motion for Stay of Execution and Relief Pending Review, filed Jan. 14, 1953.

32. Stay of Execution Bond Pending Appeal, filed Jan. 20, 1953.

33. Stay of Execution Bond Pending Appeal, filed Jan. 20, 1953.

34. Order to Stay Execution, filed Jan. 20, 1953.

35. Order Refunding Cash Bail, Paskey Dedomenico, filed 1-20-53.

36. Filed receipt, Clerk of Court to Golden Grain Macaroni Co. for Treasury Bond collateral, filed Jan. 20, 1953.

37. Filed receipt, Clerk of Court to Paskey Dedomenico, for Treasury Bond collateral, filed Jan. 20, 1953.

38. Designation of Record on Appeal, filed Feb. 6, 1953.

I further certify the following to be a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for preparation of the record on appeal in this cause, to wit:

Notice of Appeals, ($5.00 as to each defendant), and that said fees have been paid to me by the defendants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 17th day of February, 1953.

[Seal] MILLARD P. THOMAS,
Clerk,
By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to the record on appeal in the above-entitled cause the following additional papers or documents:

39. Reporter's Transcript of Proceedings at trial (carbon copy), of Dec. 2, 1952, filed Feb. 25, 1953.

40. Reporter's Transcript of Proceedings at trial (carbon copy), of Dec. 3, 1952, filed Feb. 25, 1953.

41. Reporter's Transcript of Proceedings at trial (carbon copy), of Dec. 5, 1953, filed Feb. 25, 1953.

42. Reporter's Transcript of Proceedings re Motion for New Trial heard Jan. 8, 1953, filed Feb. 25, 1953 (carbon copy).

Witness My Hand and official seal this 26th day of February, 1953.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO ADDITIONAL SUPPLEMENTAL RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting, supplemental to the record on appeal in the above cause the following additional papers or documents and exhibits:

43. Stipulation and Order for transmission of original exhibits, filed March 11, 1953.

Plaintiff Exhibits numbered 1 to 27, inclusive.

Defendant Exhibits numbered A-1 to A-9, inclusive.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 12th day of March, 1953.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13713. United States Court of Appeals for the Ninth Circuit. Golden Grain Macaroni Company, Inc., a Corporation, and Paskey Dedomenico, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 19, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13713

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO, an Individual,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY

To the Clerk of the Honorable Court:

Comes now Golden Grain Macaroni Company, Inc., a corporation, appellant in the above-entitled cause, and states that on its appeal herein it will rely on the following points:

The District Court erred in overruling appellant's objections and entering the judgment dated December 8, 1952, which found the appellant guilty of offenses charged in counts II, III, IV, V and VI of the Indictment, to wit: violation of Sections 331 and 333 of Title 21, U.S.C., and which adjudged that appellant pay to the United States the sum of $5,000.00 because:

A. Evidence offered by the United States and admitted by the court over appellant's objection to show the adulteration of food, in that it had been prepared, packed and held under insanitary conditions whereby it may have become contaminated, was obtained illegally:

(1) Officers designated by the Pure Food & Drug Administrator did not first make a request and obtain permission of the owner, operator or custodian as required by statute.

(2) The court erred in ruling that the sales manager was the custodian of the appellant's factory.

B. Evidence offered by the United States failed to prove beyond a reasonable doubt that the food complained of was adulterated because it consisted in part of a filthy substance:

(1) The insect fragment count present was infinitesimal by weight, volume or any other standard of measurement.

(2) There was no showing in evidence that the product complained of was in any sense injurious to health or safety.

(3) The trial judge erred in refusing to consider

argument and evidence on the question: "What is filth."

C. Even if guilty as charged the fine is so excessive as to indicate abuse of discretion on the part of the trial judge.

D. The trial court erred in denying appellant's motion for a new trial.

Comes now appellant Paskey Dedomenico, an individual, appellant in the above-entitled cause, and states that on his appeal herein he will rely upon the foregoing points stated by appellant corporation and incorporates them herein by reference as though fully set out. Appellant further and in addition relies upon the following points:

A. The evidence failed to show beyond a reasonable doubt that this appellant as an individual committed any act or had any intent to commit any acts which constituted offenses charged in the Indictment.

(1) Appellant was not physically present at the time when the food was allegedly introduced into interstate commerce.

(2) Appellant was not physically present at the factory when the evidence was obtained for the purpose of showing insanitary conditions.

(3) Appellant according to the evidence did not aid, abet, encourage, counsel, plan, procure, participate or in any way act as an accessory to the crime.

(4) Appellant did everything within his power

to insure that the factory would be in a sanitary condition during his absence and issued orders and instructions which, if carried out, would have prevented any insanitary condition.

Presented by:

/s/ ROBERT A. YOTHERS,
Attorney for Appellants.

[Endorsed]: Filed April 10, 1953.

[Title of Court of Appeals and Cause.]

STIPULATION CONCERNING DESIGNATION OF THE RECORD FOR PRINTING

It is stipulated and agreed by and between the parties to the above-entitled cause by their respective attorneys as follows:

The material portions of the record in the above-entitled action are hereby designated for printing and include:

The Indictment.

Judgment against the defendant Golden Grain Macaroni Company.

Judgment, sentence and order of probation against defendant Paskey Dedomenico.

The entire District Court Reporters Transcript of oral proceedings except the pages and lines indicated below:

* * *

Omit balance of volume entitled:
Notice of Appeal.
Motion for Stay of Execution.
Order Staying execution pending appeal.
Order exonerating cash posted.

It is further stipulated and agreed that subject to the approval of the United States Court of Appeals for the Ninth Circuit, the exhibits of the plaintiff and defendant which are a part of the record on appeal certified by the District Court shall be presented to the court for consideration in said appeal in their original form and without being printed in the record on appeal.

Dated at Seattle, Washington, this 3rd day of April, 1953.

GOLDEN GRAIN MACARONI COMPANY, INC.

PASKEY DEDOMENICO,

By /s/ ROBERT A. YOTHERS,
Attorney for Appellants.

/s/ J. CHARLES DENNIS,
U. S. District Attorney.

/s/ ARTHUR A. DICKERMAN,
United States Food & Drug Administration. Attorneys for Appellee.

[Endorsed]: Filed April 10, 1953.

No. 13713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPEAL FROM JUDGMENTS OF CONVICTION AND SENTENCE

HONORABLE EDWARD P. MURPHY, *Judge*

BRIEF FOR APPELLANTS

POMEROY, YOTHERS, LUCKERATH & DORE
ROBERT A. YOTHERS,
Attorneys for Appellants

Office and Post Office Address:
304 Spring Street
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 7/25/53 — 45 COPIES

No. 13713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPEAL FROM JUDGMENTS OF CONVICTION AND SENTENCE

HONORABLE EDWARD P. MURPHY, *Judge*

BRIEF FOR APPELLANTS

POMEROY, YOTHERS, LUCKERATH & DORE
ROBERT A. YOTHERS,
Attorneys for Appellants

Office and Post Office Address:
304 Spring Street
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 7/25/53 — 45 COPIES

TABLE OF CONTENTS

Page

Page

TABLE OF CITATIONS

CASES

Page

Page

UNITED STATES CONSTITUTION

FEDERAL STATUTES AND REGULATIONS

MISCELLANEOUS

No. 13713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPEAL FROM JUDGMENTS OF CONVICTION AND SENTENCE

HONORABLE EDWARD P. MURPHY, *Judge*

BRIEF FOR APPELLANTS

I. STATEMENT OF THE CASE

Appellant Golden Grain Macaroni Company is a corporation organized under the laws of the state of California, which was and now is engaged in the manufacture and sale of macaroni products. The

plant here in question is located at Seattle, Washington. Appellant Paskey Dedomenico is president of the corporation and general manager of the Seattle, Washington plant.

On July 16, 1951 appellants shipped forty-nine cases of cut macaroni for delivery to Missoula, Montana, consigned to County Fair Market (Tr. 25) under bill of lading (Plaintiff's Ex. 2). This macaroni was manufactured and packed during the twenty-fifth week of the year 1951 (Tr. 179-180) or the week of June 17 to 23, 1951. Samples for analysis were taken from this shipment by Food and Drug Inspector Ford (Tr. 41) and by him given a number 30-340 L.

Also on July 16, 1951 appellants shipped macaroni products consisting of eight cases of bulk elbow macaroni and two cases of bulk spaghetti for delivery to Eugene, Oregon, both consigned to General Grocery (Tr. 76-77) under the same bill of lading (Plaintiff's Ex. 3). These macaroni products were manufactured and packed during the twenty-eighth week of the year 1951 or the week of July 8 to 14, 1951 (Tr. 179-180). Two samples from this one shipment were taken for analysis by Food and Drug Inspector Shallit and given numbers 29-871 L and 29-872 L (Tr. 77).

On July 26, 1951 appellants shipped macaroni products consisting of twenty cases of elbow macaroni and twenty-five cases of spaghetti for delivery to Anchorage, Alaska, consigned to J. B. Gottstein Company (Tr. 46) under the same bill of lading (Plaintiff's Ex. 4). This macaroni was manufactured and packed during the thirtieth week of the year 1951, or the week of July 22 to 28 (Tr. 179-180). Two samples for analysis were taken from this one shipment by Food and Drug Inspector Chambers (Tr. 48) and by him given numbers 29-477 L and 29-478 L.

All the samples referred to above were analyzed by Food and Drug Chemist Elliott (Tr. 153, etc.) and portions furnished the appellants were analyzed by appellants' witness, a chemist Spinelli (Tr. 229, etc).

On July 18 and 19, 1951 Food and Drug Inspectors Shallit and Allen made an inspection of the Golden Grain Macaroni plant (Tr. 78). After identifying themselves as inspectors they first inquired if appellant Dedomenico was in and were informed that he was in California. The inspectors then made oral request of the office girl for permission to make an inspection. She referred the request to Mr. Joseph Mulvaney, who was in charge of production. Mr. Mulvaney, through the office girl, stated that he had no authority to grant permission for an inspection

(Tr. 80). Permission subsequently was granted by Mr. Jack McDiarmid. Mr. McDiarmid was the sales manager and had no duties with relation to the business other than sales and was not in charge of the building or production (Tr. 183 and 285). He had no authority to grant such permission nor did any other employee (Tr. 293).

On July 31, 1951 the same inspectors returned to the plant. Appellant Dedomenico was then present and granted permission to make an inspection (Tr. 112). The inspection on this occasion was not detailed. The conditions of the plant were improved though an unspecified amount of moth activity was present.

With particular reference to appellant Dedomenico, on June 28, 1951 he left Seattle for San Francisco and returned on July 25, 1951 (Tr. 284). Prior to his departure and on June 25th the plant was thoroughly and completely cleaned. During the course of his management appellant Dedomenico had instituted and set up sanitation procedures and in addition for a period of several years had employed the United States Insecticide Company for the purposes of making inspections and maintaining the plant in a sanitary condition (Tr. 288).

After administrative notice and hearing (Tr. 55)

appellants were tried by the court pursuant to the indictment (Tr. 3) and judgments and sentence entered December 8, 1952. Appellants' motion for new trial was denied on February 25, 1953, whereupon this appeal was taken.

II. QUESTIONS PRESENTED

1. Who was the owner, operator or custodian at the time of the plant inspection of July 18 and 19, 1951?

2. Did the Pure Food and Drug inspectors first make request and obtain permission of the owner, operator or custodian?

3. If not, then is evidence obtained from that inspection admissible?

4. Is Section 402(4) Federal Food, Drug and Cosmetic Act unconstitutional because of indefiniteness and therefore contrary to the Sixth Amendment to the United States Constitution?

5. Was admissible evidence offered by the United States to show adulteration under 402(4) Federal Food, Drug and Cosmetic Act sufficient to sustain convictions:

   (a) Was evidence, if any, of the state of insanitation obtained on the July 31, 1951 inspection of such a continuing nature

that shipments of products prepared during the week of July 8 to 14 could be affected?

(b) Was evidence, if any, of the state of insanitation obtained on the July 31, 1951 inspection sufficient to show that products shipped on July 26, 1951 could be affected?

6. Do Counts III and IV of the indictment charge but one offense?

7. Do Counts V and VI of the indictment charge but one offense?

8. Did the shipment of the products complained of consist in whole or in part of a filthy substance within the meaning of Section 402(a) 3 of the Federal Food, Drug and Cosmetic Act?

(a) What is the meaning of the expression "filthy substance" as used in the statute?

(b) Was the evidence of filth, if any, sufficient to sustain the convictions?

9. Was the evidence sufficient to convict the appellant Paskey Dedomenico as an individual?

10. Is an individual officer of a corporation liable in a criminal prosecution for the criminal acts of another in which such person does not participate, aid or abet, and has expressly issued instructions against such acts?

III. SUMMARY OF ARGUMENT

The Government proof of interstate shipments of adulterated food proceeded along two lines.

1. That the food had been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, and;

2. That the products consisted in whole or in part of a filthy substance.

It is the appellants' contention that evidence obtained on the first inspection with reference to the sanitary conditions of the plant was obtained illegally and therefore not admissible and that the evidence obtained on the other inspection was not sufficient to sustain the convictions. Appellants further contend that Section 402(a) 3 of the Act is void under the Sixth Amendment for vagueness and indefiniteness.

As to the shipments themselves, Counts III and IV charge but one offense and Counts V and VI charge but one offense. Therefore appellants twice were put in jeopardy and the Trial Court had no jurisdiction to enter convictions and sentences on Count IV and Count VI. The products did not consist of a filthy substance when the expression is defined and used in its ordinary sense and under the meaning which Congress intended. Finally it is con-

tended that Paskey Dedomenico as president, is free from any personal guilt since he was not present at the plant during the time the articles complained of were prepared and shipped, did not participate in any crime alleged and in fact as an individual, did his utmost to comply with the statute.

IV. ARGUMENT

A. EVIDENCE OFFERED BY THE UNITED STATES AND ADMITTED BY THE COURT OVER APPELLANTS' OBJECTION TO SHOW THE ADULTERATION OF FOOD IN THAT IT HAD BEEN PREPARED, PACKED AND HELD UNDER INSANITARY CONDITIONS WHEREBY IT MAY HAVE BECOME CONTAMINATED WAS OBTAINED ILLEGALLY.

(1) Officers designated by the Pure Food and Drug Administrator did not first make a request and obtain permission of the owner, operator or custodian as required by statute. Section 704 Federal Food, Drug and Cosmetic Act of 1938 as amended (21 USCA 374) entitled "Factory Inspection" provides in pertinent part "For purposes of enforcement of this act officers or employees duly designated by the secretary, *after first making request and obtaining permission of the owner, operator or custodian*

thereof, are authorized (1) to enter at reasonable times any factory, warehouse or establishment in which food, drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into interstate commerce * * * (2) to inspect at reasonable times such factory, warehouse, establishment or vehicle and all pertinent equipment, finished and unfinished materials, containers and labeling therein." (Emphasis supplied)

The law and decisions are clear that unless permission for the inspection is requested and obtained from the owner, operator or custodian of the plant any evidence obtained is illegal and not admissible. In the case of *U. S. v. Maryland Baking Co., et al*, 81 Fed. Supp. 560 (D.C. N.D. Ga. 1948), the court held that where the agents did not originally request nor obtain the manager's permission to inspect the plant the inspection was illegal and evidence obtained thereby was inadmissible regardless of the consent to inspection given by the plant superintendent who was the subordinate manager. In that case, though the co-owner was present on the premises, the agents obtained the permission from the plant superintendent. The facts established that the plant superintendent did not really consent to the search but merely assumed that the officers had the right to inspect and therefore did

not offer any objections. The court stated:

> "The defendants are entitled to insist on compliance with the statute."

In the case of *U. S. v. Cardiff.* 194 Fed. (2d) 686, 9th Cir. (1952, affirmed 344 U.S. 174, 97 L.Ed. 132, the Honorable Judge Denman made it clear that the requirement of first making request and obtaining permission must be given effect and could not be made nugatory by imposing a penalty for refusal to grant such permission.

Appellants' factory was inspected on July 18 and 19 after permission was refused by Mr. Joseph Mulvaney, who was in charge of production (Tr. 80). They did have the permission of Mr. Jack McDiarmid, who was the *sales manager* and had no duties with relation to the business other than sales and was not in charge of the building or production (Tr. 183 and 285). He had no authority to grant such permission nor did any other employee (Tr. 293) but, as in the case of *U. S. v. Maryland Baking Co., supra,* permission was granted because Mr. McDiarmid thought they had the right to make inspection and therefore did not object (Tr. 190). It is significant that the inspectors knew at the time that appellant Dedomenico was absent from the city of Seattle (Tr. 190). It necessarily follows from the foregoing rules of law and the facts of this case that unless the sales man-

ager was the custodian of the plant the evidence obtained was illegal and it was error to admit the same on the trial.

(2) THE COURT ERRED IN RULING THAT THE SALES MANAGER WAS THE CUSTODIAN OF APPELLANTS' FACTORY.

Implicit in the court's reasoning in the case of *U. S. v. Maryland Baking Co.*, supra, was the fact that criminal prosecution might well depend on whether permission to make an inspection was granted or refused, and that no mere employee should be able to waive the right of a business corporation or its officers to the immunity from giving evidence against themselves. Unquestionably the sales manager who gave the permission in this case was not the owner, neither was he the operator of the plant. The question remains, was he the custodian, as held by the trial court. Defined in its simplest terms, a custodian is one who has the care and possession of a thing. Bouvier's Law Dictionary, Rawle's 3rd Ed. Vol. I, page 741. Or when applied to a factory or plant the custodian would simply be the one in charge of the plant or factory. The testimony on the trial clearly established that Mr. McDiarmid, who gave the permission, was not the custodian but only was the sales manager. Quoting from McDiarmid's direct examination (Tr. 183):

Q. In what capacity were you employed in May and June and July of 1951?

A. As sales manager.

Q. And as sales manager what are your duties and responsibilities, sir?

A. I have charge of all sales and anything pertaining to sales.

Q. Do you have any duties with relation to the operation of the business other than the sales?

A. No, I haven't.

Q. Do you have any of your duties with relationship to the production of any of the food products that are produced out there?

A. No, I have not.

Q. In the absence of Mr. Dedomenico are you in charge of the building or production?

A. No, I am not.

Q. Who is?

A. Mr. Mulvaney has charge of the production.

Q. Is that same — was that true in June and July of 1951?

A. Yes, it was.

Q. Did you have any authority, were you authorized by Mr. Dedomenico, sir, to permit anyone to go into the plant?

A. No, I was not authorized by him.

Q. And at that time who was the custodian of the plant, sir?

A. Well, Mr. Mulvaney has always had charge of the production.

Q. Well, was he in charge of the building and and the warehouse and plant?

A. Yes, he had been in charge of the plant and the warehouse.

Quoting from the testimony of appellant Dedomenico (Tr. 284, 285):

Q. In your absence, Mr. Dedomenico, who was in charge of the plant? Who is the custodian?

A. Joe Mulvaney is the custodian of the plant.

Q. In Mr. Mulvaney's absence who is in charge of it?

A. If Mr. Mulvaney is not here he has another there who takes charge of the plant.

Q. And what is his name?

A. Al Whitehead.

Q. And who was in charge of the plant when you left in — during the period of time you were gone in June and July of 1951?

A. I left for San Francisco June 28. Joe Mulvaney was in charge of the plant.

Q. In what capacity is Mr. McDiarmid employed?

A. Mr. McDiarmid is the sales manager.

Q. Does he have any responsibility or duty with relationship to the plant and the manufacturing and production?

A. No sir, I have never given Jack McDiarmid any responsibility in regard to the plant whatsoever.

The foregoing testimony conclusively establishes that in no sense could Mr. McDiarmid, who gave the

permission to make the inspection, be termed the custodian. On the contrary his activities were confined to sales, a field normally outside the plant or factory. Nor could he, any more than a total stranger, assume unto himself the duties or the authority of a custodian within the meaning of the Act and open the doors to evidence which might be incriminating when used against the corporation or its offcers. It follows that evidence obtained by Inspectors Shallit and Allen on July 18 and 19, 1951 was therefore obtained illegally and not admissible to prove adulteration within the meaning of Sec. 402(a) 4 of the Federal Food, Drug and Cosmetic Act. (Title 21, USCA, Sec. 342 (a) 4).

B. SECTION 402(A) 4, FEDERAL FOOD, DRUG AND COSMETIC ACT (21 USCA 342 (a) (4) IS UNCONSTITUTIONAL IN THAT IT IS SO INDEFINITE, UNCERTAIN AND OBSCURE THAT IT DOES NOT INFORM ONE ACCUSED THEREUNDER OF THE NATURE AND CAUSE OF THE ACCUSATION IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

> "Section 402: A food shall be deemed to be adulterated—(a)4 if it has been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth or whereby it may have been rendered injurious to health;"

Appellants in making this contention fully recognize the rule followed in this and other jurisdictions that it is incumbent upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the Constitution and that it is not sufficient to raise a doubt. *Gorin v. U. S.*, 111 Fed. (2d) 712, 9th Cir. (1940), citing the Legal Tender Cases, 79 U. S. 457, 20 L.Ed. 287. The constitutionality of Sec. 402 (a) 4 of the Act has not heretofore been raised in this jurisdiction. It was decided, however, by the United States Court of Appeals for the 8th Circuit in the case of *Berger v. U. S.*, 200 Fed. (2d) 818 (1952) that the section in question conveys a sufficiently definite warning as to what

conduct would constitute a crime and is not unconstitutional for vagueness and uncertainty. Appellant urges that the foregoing decision of the Eighth Circuit is contrary to established principles of constitutional law, is logically unsound and should not be followed in this jurisdiction. The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation;"

If the section of the Act is so uncertain and indefinite as to be contrary to the Sixth Amendment then it also runs contrary to the Fifth Amendment to the Constitution of the United States in that there has been an illegal delegation of legislative power to the courts and juries which runs contrary to the due process clause: "Nor be deprived of life, liberty or property without due process of law."

In an extremely well reasoned opinion the United States Supreme Court in the case of *Connally v. General Const. Co.*, 269 U.S. 385, 70 L.Ed. 322, found unconstitutional indefiniteness in a statute calling for "the current rate of per diem wages in the locality" where contractors were doing Government work. The test laid down was whether or not the Legislature uses terms "so vague that men of common intelligence must

necessarily guess as to its meaning and differ as to its implication. The terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." It is a well recognized requirement consonant alike with ordinary rules of fair play and the settled rules of law. The opinion contains an extensive analysis of the cases and the court at the outset balances the points of differentiation.

> "The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld. In others declared invalid. The precise point of differentiation in some instances is not easy of statement but it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning well enough known to enable those within their reach to correctly apply them. *High Grade Provision Co. v. Sherman*, 266 U. S. 497, 502; or a well settled common law meaning, notwithstanding an element of degree in the definiteness as to which estimates might differ. *Nash v. U. S.* 229 U. S. 373, 376, 57 L.Ed. 1232. *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223. Or, as broadly stated by Mr. Chief Justice White in *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 92:
>
> 'That for reasons found to result either from the text of the statutes involved or the subjects with

> which they dealt a standard of some sort was afforded'."

In *U. S. v. Brewer*, 139 U.S. 278, 35 L.Ed. 190, an early landmark case, the court stated at page 288:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid. Before a man can be punished his case must be plainly and unmistakably within the statute."

In *Musser v. Utah*, 333 U.S. 95, 92 L.Ed. 562, in 1947 the United States Supreme Court remanded and vacated a conviction under a Utah statute which made criminal a conspiracy

> "To commit acts injurious to public morals."

The charge was advising the practice of polygamous marriages. The court stated:

> "Standing by itself it would seem to be warrant for conviction the agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notion of what was good for health and morals."

In the case perhaps most frequently cited, *U. S. v. L. Cohen Grocery Co.* 255 U. S. 89, 65 L.Ed. 516, the court used this language in declaring the Lever Act unconstitutional:

> "The sole remaining inquiry therefore is the certainty or uncertainty of the text in question, that is whether the words 'that it is hereby made unlawful for any person willfully to make any un-

> just or unreasonable rate or charge in handling or dealing in or with any necessaries', constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusations against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially in hearing in the transaction as to which it provides. It leaves open therefore the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the court below in its opinion to the effect that to attempt to enforce this action would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to public interest when unjust and unreasonable in the estimation of the court and jury."

A case frequently cited in contending for the constitutionality of an act which it is alleged is indefinite is *Nash v. U. S.* 229 U.S. 373, 57 L. Ed. 1232, in which Justice Holmes, in his philosophical and common law approach stated that the fact that the definition contained an element of degree as to which estimates may differ does not make it void for vagueness. However, in the case of *International Harvester v. Kentucky*, 234 U. S. 216 (1914), 58 L. Ed. 1284, in which Justice Holmes declared a state of Kentucky anti-trust law

void for vagueness, he said of his own opinion in *Nash v. U. S.*, supra:

> "It goes no farther than to recognize that as with negligence between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and the complexity of life makes it impossible to draw a line in advance without an artificial simplification . . . The conditions are as permanent as anything human and a great body of precedence on the civil side coupled with familiar practice make it comparatively simple for common sense to keep to what is safe."

A recent case to illustrate when the court held a statute not void because of vagueness or uncertainty, is the case of *U. S. v. Petrillo*, 332 U. S. 1 (1947), 91 L. Ed. 1877. The statute prohibited the act of coercing a licensee to employ in the broadcasting business any person or persons in excess of the number of employees needed by such licensee to perform actual services. In reaching its conclusion the court reasoned, and properly so, that any person knows when he is willfully attempting to compel another to hire unneeded employees.

The case of *U. S. v. Durst*, 59 Fed Supp. 891 (D.C. S.D. W.Va.) (1945) is particularly appropriate in this discussion for it concerns the question of sanitation. The case was decided on the demurrer to an information charging violation of a War Food distribution order issued under Second War Powers Act of 1942, 56

Stat. 171. The court held that any statute or regulation purporting to define crime and fix penalty therefor which fixes no definite standard by which guilt or innocence may be measured violates the U. S. Constitution, Amendment Six, and that a War Food Distribution Order (having the effect of a statute) requiring slaughterers to maintain "minimum sanitary facilities" defined as a structure that is "reasonably" fly and rodent-proof with "ample" light and ventilation and a "reasonable" distance from specified sources of fly-breeding or contamination was invalid because of the uncertainty of the quoted words. The court reasoned that what would be reasonable or unreasonable is necessarily left for determination according to the fastidiousness or sense of cleanliness of the individual whether juror or judge who is to pass upon the question. This is not the fixed and unimmutable standard of guilt which is required of a criminal statute or regulation.

In the light of these principles and decisions we now comes to the consideration of legislation on this review which makes it a criminal offense for any person to introduce or deliver for introduction into interstate commerce any food which "* * * has been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth * * *" Appellants urge that this provision presents

a double uncertainty fatal to its validity as a criminal statute. First, what are "insanitary conditions"; second, under what circumstances do conditions become so insanitary that food prepared, packed or held under them "may become contaminated with filth?" To use the language of the case of *U. S. v. Capital Traction Co.*, 34 App. Dec. 592, holding a statute unconstitutional for vagueness which made it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding." "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. Penal statutes prohibiting the doing of a certain thing and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirement and the courts upon another."

Is not the determination of what is or what are insanitary conditions, to use the words of the court in the case of *U. S. v. Durst*, supra, necessarily left to the "fastidiousness or sense of cleanliness of the individual, whether juror or judge who is to pass upon the question?"

In seeking to fathom the meaning of this section the manufacturer could, of course, consult the dictionary, where he would find the word "insanitary" defined "not sanitary, prejudicial to health, likely to cause disease." (Funk & Wagnall's New Standard Dictionary, 1952 Ed.) Such a definition is as vague and uncertain as the statute itself. The difficulty and uncertainty with which the manufacturer is faced under this section is made abundantly clear by the record in this case. The sum of the testimony of Inspector Fred Shallit for the Government is that the plant in question was in an insanitary condition (Tr. 140). On the other hand, witness for the defense Morris J. Hubert of the Quartermaster Corps, Inspection Division, United States Army, which purchased approximately 600,000 pounds of macaroni products from appellants testified (Tr. 265) that from his observation the conditions at the plant were sanitary and that the employees and their uniforms were very clean. He had had occasion to observe the conditions on six or seven times during the months of May and June, 1951 (Tr. 263) and on June 25, 1951 the Army Quartermaster issued a certificate of quality and condition for such items with relation to appellants' plant (Tr. 267) which set forth certain tests that were made and the results, that the products were free from filth.

Thus the words "insanitary conditions" have in

this very case led to that type of uncertainty which requires that a statute be declared void for vagueness. To use the test announced in *Connally v. General Construction Co.*, supra, here is a case, if ever there was one, where men of common intelligence must necessarily guess as to its meaning and differ as to its application. Inspectors from one agency of the Government, the United States Quartermaster Corps of the Army, have differed with the inspectors of the Pure Food and Drug Act. Those differences have arisen even among men who are experts in the field of sanitary inspection and it is fair to assume that ordinary laymen found on jury panels would have occasion to differ even more. Indeed appellants were prepared to show that the Food and Drug inspectors would themselves differ as to whether or not a plant was insanitary, within the meaning of the section here in question. The trial court refused to admit evidence (Tr. 133, 134) which would have tended to show that conditions found in the plant of the Mission Macaroni Company of Seattle were very much the same as those found in appellants' plant and yet the inspector determined that one factory was sanitary and that the other was not. Such uncertainty inheres in the language because it fails to meet the requirement of *U. S. v. L. Cohen Grocery*, supra, in that the section forbids no specific or definite act. When to these words are

added the phrase "whereby it *may* have become contaminated with filth" (emphasis supplied) uncertainty becomes compounded and the subject matter of any investigation then has no bounds. True, the courts have held, see *Berger v. U. S.*, supra and cases cited under point 5, that this language requires more than a mere possibility of contamination but requires a condition which would with reasonable possibility result in contamination. This of course is a clear case of the court straining to avoid unconstitutionality by the process of construction. Appellants respectfully submit that it is not the function of the courts to re-write vague language which standing alone is unconstitutionally indefinite. To use the words of Judge Pope in his concurring opinion in the case of *U. S. v. Cardiff*, supra, though he spoke of another section of the statute it is equally appropriate here,

> "I think that the statute as written is just plain nonsense and because it is not the function of the court to re-write such language the judgment must be reversed."

Under what insanitary conditions may a product become contaminated? Just to state the question demonstrates the fatal uncertainty and indefiniteness of the language. Under the decisions, there is no requirement to show definitely that the product did become contaminated as a result of the "insanitary

conditions." If that be the case, then the question arises, what degree of remoteness with respect to time is within the statutory prohibition? Must products be packed and held at the time when the alleged "insanitary conditions" exist? Or day before or day after, or week before or week after, or a month before or a month after? And again with respect to the physical position of the product with reference to the supposed "insanitary condition." Would products held in the basement, the warehouse or the shipping room possibly become contaminated because of moth larvae on the ceiling of the third floor? We urge that these are not idle suppositions but are questions presented by this case by which a man and his corporation were found beyond a reasonable doubt to be guilty of violating a section of the statute which apparently Congress expected the courts to determine and to define the various conditions which are includable in this phrase. As stated by the Supreme Court of the United States in *U. S. v. C. I. O.*, 335 U.S. 106, 92 L.Ed. 1849, 68 S.Ct. 1349 (1948) at page 142:

> "Blurred signposts to criminality will not suffice to create it."

We urge again that this is not a judicial function but an illegal delegation of legislative power to courts and to juries to determine what acts are criminal.

C. EVIDENCE OFFERED BY THE UNITED STATES TO SHOW THE ADULTERATION OF FOOD IN THAT IT HAD BEEN PREPARED, PACKED AND HELD UNDER INSANITARY CONDITIONS IS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

Should the court decide that Section 402 (a) (4) is constitutional, the evidence offered on the trial is nevertheless insufficient to sustain the convictions under this section. As indicated above and we think beyond question, the evidence obtained from inspections on July 18 and 19 is not admissible. The next inspection was made on July 31, 1951. The testimony as to this inspection is found on page 114 of the Transcript and indicates that an unspecified amount of moth activity was present in the plant. There was no testimony whatsoever to connect this condition with products manufactured during the week of July 8 to 14 and shipped on July 16. In other words, the conditions at the plant on July 31, 1951 could have no possible bearing on the question of whether or not the products prepared some three weeks before might have become contaminated thereby, especially in view of the evidence presented by Mr. Joseph Mulvaney, in charge of the plant, beginning on page 202 of the Transcript, which indicates the daily and weekly pro-

cedures for cleaning the plant. Admittedly none of the inspectors were present at the plant during the week of July 8 to 14. The only possible evidence to sustain the convictions under Counts II, III and IV with respect to adulteration through preparation under insanitary conditions rests upon a presumption that the conditions, unspecified as they were, found on July 31, 1951, had continued from the period of July 8 to 14, 1951. Manifestly that sort of presumption on the type of evidence referred to is not sufficient to overcome the presumption of innocence under these charges and constitute proof of guilt beyond a reasonable doubt.

One shipment remains in question though set out in two counts in the indictment, and that is the shipment made on July 26, 1951 to Anchorage, Alaska. Five days after the shipment and seven days after these products were packaged the inspection was made. This presents the question, loaded with uncertainty as it is, do the conditions found on July 31 constitute insanitary conditions whereby the products shipped nearly a week before may have become contaminated. According to the testimony of Mr. Joseph Mulvaney (Tr. 206) who has been in charge of production and been in the plant every day for years, with respect to moth activity, "one day you don't see them and the next day you do." We urge that

any presumption or inference that conditions found on July 31 could affect articles prepared on July 24 is subject to too many variables to prove the guilt of appellants beyond a reasonable doubt. First of all, the evidence is not specific other than to indicate that live and dead moths were found in the factory. This may or may not have given rise to an insanitary condition at the time of the inspection. On this the inspector did not express his opinion. Further, considering the life cycle of the moth and the testimony of Mr. Mulvaney, one day the factory would be free of moths and the next day they would appear. Might the products shipped on July 26th have become contaminated? From the evidence, who can say? Or, what of course is important here, who can say that the evidence is sufficient to support a conviction in view of the Government's burden to prove its case beyond a reasonable doubt. We are aware that the appellate court is not the trier of the fact but urge that in this case the trier of the fact had no evidence sufficient to support his findings of guilt.

D. COUNTS III AND IV OF THE INDICTMENT CHARGE BUT ONE OFFENSE, COUNTS V AND VI CHARGE BUT ONE OFFENSE AND THEREFORE JUDGMENTS AND SENTENCES UNDER COUNT IV AND COUNT VI MUST BE SET ASIDE FOR VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Amendment Five to the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property without due process of law . . ."

The test of double jeopardy is the identity of offenses charged. *U. S. v. Huggins*, 184 Fed. (2d) 866 (1950) and the test of double jeopardy through a multiplicity of counts is whether a conviction on one count and an acquittal on another would bring about a contradiction on the face of the verdict. *U. S. v. Marzani*, 71 Fed. Supp. 615, District Court of District of Columbia (1947), affirmed 168 Fed. (2d) 133, affirmed 335 U. S. 895, 93 L. Ed. 431. Or if defendant upon the first charge could have been convicted of an offense on the second, then he has been in jeopardy. *State v. Martin*, 154 Ohio 539, 96 N. E.

(2d) 776 (1951). The test as stated in this jurisdiction in the case of *Carney v. U. S.* 163 Fed. (2d) 784, 9th Cir. (1947) citing *Blockburger v. U. S.*, 284 U. S. 299, 76 L.Ed. 306, as to whether two offenses or one is charged, is whether each requires proof of an additional fact which the other does not. Only two cases have been found which decide or consider this problem under the Pure Food and Drug Act. Both of them are District Court cases in other jurisdictions with conflicting results. *U. S. v. Watson-Durand-Kasper Grocery*, 251 Fed. 310, District Court of Kansas (1917) and *U. S. v. Direct Sales Co.*, District Court, Western Division, New York (1918) 252 Fed. 882. We urge that the Watson-Durand-Kasper Grocery Company case has announced the correct rule and should be followed and in some aspects is distinguishable from the case of *U. S. v. Direct Sales Company*, supra. In the Direct Sales Company case the information charged in fourteen counts the misbranding and adulteration of seven different medicines (Acetanalid, calomel, quinine sulphate, salol, sodium salicylate, elixir iron pyrophosphate, strychnine and hydriozyc acid) contained in a single shipment. There was a plea of guilty and a question of the penalty to be imposed. The court held that the article is specified as the unit of offense, as distinguished from the shipment, and here there were seven different articles, each adulterated and each

misbranded, therefore fourteen separate offenses, pointing out that there were deceptions both as to the money value and as to the medicinal value. Note, however or emphasize that each medicine was a different drug intended for a different purpose. The case of *U. S. v. Watson-Durand-Kasper Grocery*, supra, we urge was correctly decided and should be followed. The defendant was charged in seven counts with violation of the Food and Drug Act of 1906 (c. 3915, Sec. 2, 34 Stat. 768) for interstate shipment of adulterated food. Section 2 of that Act made it an offense to transport in interstate commerce any article of food or drugs which was adulterated, stating that:

> "Any person who shall ship * * * any such article so adulterated or misbranded * * * shall be guilty of a misdemeanor and for such offense be fined * * *"

The case was heard on a demurrer and stipulation of the following facts: The defendant shipped two hundred fifty pails of candy, variously labeled, under two railroad freight bills. The samples showed adulteration by analysis. It was held, conceding the adulteration, that only one offense had been committed. The court reasoned that there was but one sale, purchase and shipment and the entire matter grew out of one transaction and the shipment offered

must be taken as a unit although it consisted of many parcels. Referring to the indictment in this case (Tr. 6 to 12) it is evident that the only difference between Count III and Count IV is that Count III charges the adulteration of a food, elbow macaroni, and Count IV charges the adulteration of a food, spaghetti. The only difference between Count V and VI is that Count V charges the adulteration of elbow macaroni and count VI charges the adulteration of spaghetti. On Counts III and IV the consignee was identical, the date of shipment is the same, July 16, 1951, the date of manufacture of the products is the same, the week of July 8 to 14. All the articles appear on one bill of lading and the food in question in each count is one and the same in that it consisted of macaroni products made from the same base, that is, flour paste. The same facts are true of Counts V and VI, that is, the consignee, the date of manufacture, the date of shipment, the bill of lading and the product are identical. The reasoning of the courts in condemnation cases supports appellants' position. In the case of *U. S. v. 935 Cases, More or Less, Containing Six No. 6 Cans of Tomato Puree*, 65 Fed. Supp. 503, District Court, Northern Division of Ohio (1946), a condemnation case under Section 334 of the Act, the court held that the word "article" includes an entire shipment of the same product. The "article" is

the product shipped in the cases or cans and not the individual case or can. The same rule has been adopted in this jurisdiction in the case of *A. O. Andersen & Co. v. U. S.* 284 Fed. 542, 9th Circuit (1922). In other words, were a condemnation proceeding brought as to the shipment charged in Counts III and IV and in Counts V and VI, no distinction could be made between macaroni and spaghetti but the entire shipment containing all of the cases would be subject to condemnation. In other words, the article of food would include the entire shipment and not be restricted to each case involved. The contention of identity of product is further borne out by the testimony of the inspectors themselves. Inspector Shallit (Tr. 76):

> Q. Mr. Shalitt, did you take some samples from some of the shipments involved in this proceeding?
>
> A. Yes, I did.
>
> Q. Which ones were they?
>
> A. On 7-16-51 I visited the West Coast Fast Freight and I obtained *two samples of macaroni products.* (emphasis supplied)

Further applying the tests of double jeopardy as set forth above as between Counts III and IV and Counts V and VI, no additional facts are required to prove Count IV over the facts required to prove Count III and no additional facts are required to

prove Count VI than are required to prove Count V. Or to state it in another way, if appellants had been acquitted on Count III there could have been no conviction on Count IV and if appellants had been acquitted on Count V there could be no conviction on Count VI. The same evidence was used to prove Counts III and IV and the same evidence used to prove Count V and Count VI. To refer again to the language in the *Watson - Durand - Kasper Grocery Co.* case, supra, the shipment offered must be taken as a unit, although it consists of many parcels, or to rely on the language in the condemnation cases, supra, the "article" is the product shipped and not the individual case or can. It follows that appellants were twice placed in jeopardy for the same offense and that convictions and sentences entered on Count IV and on Count VI violate appellants' rights under the due process clause of the Fifth Amendment to the United States Constitution.

E. EVIDENCE OFFERED BY THE UNITED STATES FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE FOOD COMPLAINED OF WAS ADULTERATED BECAUSE IT CONSISTED IN PART OF A FILTHY SUBSTANCE

(1) The insect fragment count present was infinitesimal by weight, volume, or any other standard of measurement.

It is appropriate to state at the outset of this discussion the important principle that must not be lost sight of and that is that a proceeding charging interstate shipment of adulterated food is a criminal proceeding in which the burden of proving the allegations beyond a reasonable doubt rests upon the Government and that the defendants are entitled to the recognized presumption of innocence. *U. S. v. Commercial Creamery Co.*, 43 Fed. Supp. 714 (D.C. E.D. Wash.) (1942). The case of *Alberty v. U. S.* 159 Fed. (2d) 278, 9th Cir. (1947) is authority for the proposition that though civil actions construe the Act liberally no such construction should be used against an accused in a criminal case, citing with approval the language of *M. Kraus and Brothers, Inc. v. U. S.* 327 U. S. 614, 621, 90 L. Ed. 894, which strictly

construed the criminal sanctions of the Emergency Price Control Act. Even in the condemnation cases, as for example, *338 Cartons, etc. v. U. S.* 165 Fed. (2d) 728, 4th Cir. (1947), the court held that the jury was properly instructed that in order to make a finding that the butter in question consisted in part of a filthy substance it must be satisfied that the filth was present in a substantial degree.

Though each case must necessarily turn upon its own facts, an examination of the decided cases will aid in resolving the question, first of all, what is filth? And secondly, whether or not the evidence in this case is sufficient to support the convictions. *Triangle Candy Co., et al v. U. S.* 144 Fed. (2d) 195, 9th Cir. (1944) held that where the plant contained rats and cockroaches and samples indicated the product contained an excess of rodent hairs, insect larvae, fragments and pellets of rodent excreta that the product contained a filthy substance. In the case of *U. S. v. 391 Second Hand Bags of Coffee,* D.C. E.D. N.Y. (1950), reported in 2 Food, Drug, Cosmetic Law Reporters, 7864, the product contained dirty and scorched paper, nails, charcoal, wood splinters, glass and metal fragments, small manure fragments, rodent pellets and had been submerged in polluted water. Held adulterated. *U. S. v. 284 Barrels of Dried Eggs,* D.C. W.D.

Tenn. (1943) 52 Fed. Supp. 661, held when dried eggs were offensive to the sense of smell and eggs contained from 122 million bacteria per gram to a maximum of over 4 billion bacteria per gram, the product was adulterated and subject to condemnation.

U. S. v. 44 Cases, etc. Viviano Spaghetti with Cheese, 101 Fed. Supp. 658, D.C. E.D. Illinois (1951) the product condemned contained fly eggs and maggots. *U. S. v. Lazere*, D.C. N.D. Ia. (1944) 56 Fed. Supp. 730, the defendant was enjoined under temporary injunction from shipping bakery products when it appeared that the flour in the storeroom had been gnawed by rats and contaminated by urine and excreta from rodents, nests and the young of mice, cockroaches crawling in the food and a sewage problem in the basement and ten to twenty-five flies on each tray of rolls.

In the case of *U. S. v. Roma Macaroni Factory*, 75 Fed. Supp. 663, D.C. N.D. Cal., the product contained vermin excrement, rodent hairs and other hair.

U. S. v. 133 Cases of Tomato Paste, 22 Fed. Supp. 515, D.C. E.D. Penn. (1938) the evidence showed that the paste had been manufactured from tomatoes infested with corn ear worms and the paste showed eighty-five worm fragments per 300 cubic centimeters. The product was condemned.

In the foregoing cases there is little doubt and no room for argument that the food involved contained a filthy substance. However, the facts in this case and the evidence of adulteration do not fall within that group of cases. The decisions are unanimous for at least one proposition and that is that the word "filthy" as used in the Act should be construed to have its usual and ordinary meaning and should not be confined to any scientific or medical definition. *U. S. v. Swift & Co., et al,* D.C. M.D. Ga. (1943) 53 Fed. Supp. 1018; *U. S. v. Lazere,* supra and *A. O. Andersen & Co. v. U. S.,* supra.

In the *Andersen Case* the court stated in defining the word "decomposed":

> "Decomposed means more than the beginning of decomposition. It means a state of decomposition and the statute must be given a reasonable construction to carry out and effect the legislative policy or intent."

By analogy, which seems proper since the word "decomposed" appears in this same section of the Act, the word "filthy" must mean more than a beginning, it must mean a state of filth, if the statute is to be given a reasonable construction. The testimony of the Government to prove that the products were adulterated by reason of the fact that they consisted in part of a filthy substance, begins on page 153 of the Transcript and was presented by Robert Elliott, Chemist

for the United States Food and Drug Administration. His unreasonable, unscientific and unrealistic approach toward the inspection is revealed by his testimony on page 176 in which he gave his opinion that a sample containing but one moth fragment would be unfit for food, basing his opinion on his conclusion that the same would be a filthy product. In contrast, attention is invited to the testimony of Morris J. Hubert, previously mentioned, of the Army Quartermaster Corps, which issued a certificate of quality and condition for subsistence, and the testimony of Swain Oddson, supervisor of Quartermaster Inspectors for the Army (Tr. 270), who stated that in contracts performed by appellants totaling 600,000 pounds during the month of May and June, 1951 there had been no rejections whatever, and the testimony of William J. Carr, (Tr. 272) Chief Chemist of the Seattle Branch of the Sixth Area Army Medical Laboratory, stating that by Army standards the presence of insect fragments ten to a portion would not constitute a filthy substance.

Equally impressive is the testimony of Dr. Paul V. Gustafson (Tr. 277) professor at the University of Washington Medical School teaching in the micro-Biology Department, who testified as follows:

> Q. And Doctor, assuming that you have a half a pound of spaghetti and that in that half

pound of spaghetti there was as much as twenty-two insect fragments, moth scales and a capsule identified in size under the miscroscope roughly represents four and four-tenths parts per million by volume, state whether or not in your opinion that would be filthy?

A. (Over objection) I can't see how that would be called filthy.

The testimony of John Spinelli, employed by the Food, Chemical and Research Laboratory of Seattle, which is equally realistic, scientific and impressive in reaching a determination as to whether or not the appellants' product consisted in whole or in part of filthy substance, testifying on page 246:

Q. So that the total volume of the insect fragments that you discovered in relationship to the total volume of the sample you used was roughly, would you say, one or two parts per million?

A. Something on that order. If you were calculating that out it would run in parts per million.

Q. And the same would be true, would it, so far as the weight is concerned?

A. That is right. You have to make a few assumptions. You would have to assume the weight of the moth at the same density as spaghetti but it is so inconsequential in making that kind of a determination that you could safely assume that it would be in parts per million.

Q. Could you give us some example now what you mean, parts per million, in ordinary daily

examples?

A. Oh, probably the foreign particles floating around in this room run over four or five parts per million. A glass of water perhaps has several parts per million of suspended solids.

Even accepting the findings of the Government chemist to be correct, when viewed in the light of the rule that the words "filthy substance" must be taken to have their usual and ordinary meaning, appellants' product is not filthy. It cannot be the meaning or intention of Congress that a product is filthy which contains less contamination than the air we breathe, less contamination than a glass of water, that contains foreign particles that can only be discovered under a high powered miscroscope, that is not offensive to the senses of sight, touch, taste or smell and in no way injurious to health.

(2) THE TRIAL JUDGE ERRED IN REFUSING TO CONSIDER ARGUMENTS ON THE QUESTION: "WHAT IS FILTH?"

Coloring and hampering appellants' entire presentation of their defense was the court's ruling to be found on page 182 of the Transcript, in which he said:

> "Now, filth is filth. You don't have to go into refinements about analyzing what constitutes filth to me. You will abandon that portion of your

argument. It wouldn't have existed there at all if proper precautions had been taken."

The very essence of this case is the question "What is filth?" Or do these products consist in whole or in part of a filthy substance? No fair trial could be had without the fullest presentation of evidence and argument on this one point of law before a judge who had obviously pre-judged this question before the appellants had an opportunity to present their defense. It is urged that this is not harmless error but is crucial and goes to the very heart of the case. How could there be proof of guilt beyond a reasonable doubt when the most important part of that proof was not even considered by the trial court.

(3) There was no showing in evidence that the product complained of was in any sense injurious to health or safety or unfit for food.

Section 402 (a) (3) of the Federal Food and Drug Act of 1938 provides:

> "A food shall be deemed to be adulterated if it consists in whole or in part of any filthy, putrid or decomposed substance or if it is otherwise unfit for food."

The Courts of Appeal for the 10th Circuit and the 8th Circuit have held that the words "or if it is otherwise unfit for food," do not condition, qualify or add any requirements of proof to the preceding words.

These cases are *U. S. v. 1851 Cartons Labeled in part "H & G Famous Booth Seafoods," et al*, 146 Fed. (2d) 760, 10th Circuit, (1945) and *Salamonie Packing Co. v. U. S.* 165 Fed. (2d) 205, 8th Circuit (1948) (Cert. den. 333 U.S. 863, 92 L.Ed. 1142). The latter opinion merely follows that of the 10th Circuit without discussion of the question.

Appellants urge that those cases are erroneously decided and should not be followed in this jurisdiction. Section 402 (a) of the Act also contained in Section 342 (a) of Title 21, USCA, under which these actions were brought, shows what Congress was trying to accomplish. This section has six sub-divisions:

"A food shall be deemed to be adulterated;

(1) if it bears or contains any *poisonous* or deleterious substance which may render it *injurious to health;* but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it *injurious to health;* or

(2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of Section 406; or

(3) if it consists in whole or in part of any filthy, putrid or decomposed substance or if it is *otherwise unfit for food;* or

(4) if it has been prepared, packed or held under insanitary conditions whereby it may have

become contaminated with filth or whereby it may have been rendered *injurious to health;* or

(5) if it is in whole or in part the product of a *diseased animal* or of an animal which has died otherwise than by a slaughter; or

(6) if its container is composed in whole or in part of any *poisonous* or deleterious substance which may render the contents *injurious to health.*" (Emphasis supplied)

Reading the section as a whole it is apparent that Congress had in mind prohibiting the interstate commerce of food products which were dangerous to health and unfit for food. Before the amendment of June 25, 1938, a comparable section of the Act, 21 U.S.C.A. 8, read that a food shall be deemed to be adulterated:

"6. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance or any portion of an animal unfit for food, whether manufactured or not."

The amendment inserted the word "any" before the word "filthy" and the word "otherwise" before the word "unfit" so that it read:

"A food shall be deemed to be adulterated . . . (3) if it consists in whole or in part of *any* filthy, putrid, or decomposed substance, or if is is *otherwise* unfit for food; . . ." (Emphasis supplied)

As a matter of first impression it seems conclu-

sive that the amended section indicates that Congress intended that the filthy, putrid or decomposed substance must make the product unfit for food. There would seem to be no reason for the word "otherwise" except to refer to the first part of the sentence. The cases decided prior to the amendment of course held this section as prohibiting the interstate shipment of food which consisted in whole or in part of any filthy, putrid or decomposed substance, irrespective of whether it was injurious to health. *A. O. Andersen & Co. v. U. S.*, supra. But there seems to be no logical reason for decisions since that time to ignore the words that Congress added to this section by the amendment. The case relied upon in the 10th Circuit cited above, *U. S. v. 1851 Cartons, etc.*, and the 8th Circuit case, *Salamonie Packing Co. v. U. S.*, supra, is a District Court case, *U. S. v. 184 Barrels Dried Whole Eggs*, 53 Fed. Supp. 652, which is only authority for the proposition that the amended language does not require a showing that the food in question is injurious to health and this proposition is based upon the case decided under the 1906 Act. It can be assumed that Congress was aware of these interpretations and passed the amendment with these decisions in mind so that Section 402 (a) 3 might be brought into line and made consistent with other sections of the Act contained in Section 402, when read as a whole, in

view of the apparent purpose to prevent the shipment of food products which were dangerous to health and unfit for food. The phrase "otherwise unfit for food" must mean something, unless it is to be ignored by the court. As stated by the United States Supreme Court in the case of *62 Cases of Jam v. U. S.*, 340 U. S. 593, 59 L.Ed. 566, 71 S.Ct. 515 (1951) at page 596, the court stated:

> "Our problem is to construe what Congress has written. After all, Congress expresses its purpose in words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor distort."

And in the same case we find this language:

> "In construing the Federal Food, Drug and Cosmetic Act to effectuate the Congressional purpose of protecting the public, the Supreme Court must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

Or as stated by the court in the case of *C. C. Company v. U. S.*, 147 Fed. (2d) 820, C.C.A. Georgia (1945):

> "The Federal Food, Drug and Cosmetic Act was enacted in the interest of the public welfare, to protect public health and courts must give it effect according to its terms."

In the 10th Circuit case, *U. S. v. 1851 Cartons*, etc., supra, the court stated that;

> "There may be drawn a fair inference from the language that Congress considered that proof of the condition described made the particular article or product unfit for food."

This statement if made explicit and expressed in the form of a hypothetical syllogism would read as follows:

> "If a product consists in whole or in part of a filthy, putrid or decomposed substance, then it is unfit for food."

If this statement is valid, that is, if the consequent follows from the antecedent, then the logical conclusion which necessarily follows is:

> If the product is not unfit for food, then it does not consist in whole or in part of any filthy, putrid or decomposed substance.

This exactly states the position of the appellants and, we submit, is what the language of the Amendment expresses as the intention of Congress. It was not the intention of Congress so far as can be found in the language of the Act, to protect the aesthetic senses of the public. As expressed in the case of *McNeill & Higgins Co. v. Martin*, 107 So. 299, Supreme Court of Louisiana (1926):

> "The object of that act (Pure Food and Drug Law) is to keep unwholesome, adulterated and misbranded articles out of interstate commerce. It is a far cry from what may not be thought fit

> for human consumption because it may be unpalatable to that which is unfit for consumption because it is unwholesome. Bird nests, shark fins, blubber, snails, etc. may be highly repulsive as food to some but many regard them as delicacies. Pure Food Laws are not intended to regulate tastes or appetites but to secure against unwholesome food."

Unless this construction is adopted the results of the Act are absurd in that in one section it allows products to contain the most dangerous poisons so long as not injurious to health but requires the criminal conviction of one who has shipped products containing two or three parts per million of adulteration, which is less than that found in the air we breathe or the water we drink and according to all the evidence in the case, is in no sense unfit for food or harmful to the consumer in any way. As mentioned above, the construction contended for by the appellants gives affect to the intent of Congress as declared by the Supreme Court of the United States and gives meaning to the words that Congress used to express its intention.

F. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL.

Because of the admission of evidence which is obtained illegally and by the court's refusal to admit

testimony of the appellants bearing on the question "What is Filth?" and whether or not the product was injurious to health and in failing to consider argument on the question "What is filth" and what is the meaning of the expression "insanitary conditions" the trial court erred in denying appellants' motion for new trial.

G. THE EVIDENCE FAILED TO SHOW BEYOND A REASONABLE DOUBT THAT THE APPELLANT PASKEY DEDOMENICO AS AN INDIVIDUAL COMMITTED ANY ACT OR HAD ANY INTENT TO COMMIT ANY ACTS WHICH CONSTITUTED OFFENSES CHARGED IN THE INDICTMENT.

(1) APPELLANT WAS NOT PHYSICALLY PRESENT AT THE TIME WHEN THE FOOD WAS ALLEGEDLY INTRODUCED INTO INTERSTATE COMMERCE

(2) APPELLANT WAS NOT PHYSICALLY PRESENT AT THE FACTORY WHEN THE EVIDENCE WAS OBTAINED FOR THE PURPOSE OF SHOWING INSANITARY CONDITIONS

(3) APPELLANT ACCORDING TO THE EVIDENCE DID NOT AID, ABET, ENCOURAGE, COUNSEL, PLAN, PROCURE, PARTICIPATE OR IN ANY WAY ACT AS AN ACCESSORY TO THE CRIME

(4) APPELLANT DID EVERYTHING WITHIN HIS POWER TO INSURE THAT THE FACTORY WOULD BE IN A SANITARY CONDITION BOTH BEFORE AND DURING HIS ABSENCE AND ISSUED ORDERS AND INSTRUCTIONS WHICH IF CARRIED OUT WOULD HAVE PREVENTED ANY INSANITARY CONDITION

The above four items all pertain to the same principle of law and the same evidence. Consequently they will be argued as one item.

Turning now with more particularity to the appellant Paskey Dedomenico as an individual against whom the indictment in the above entitled case was brought and for the purpose of brevity we incorporate herein the arguments heretofore made relative to the points raised by the appellant corporation, and further rely upon the additional point that a careful

reading of the record and consideration of exhibits will show that the appellant Paskey Dedomenico, if he, as an individual, is to be found guilty upon the facts and evidence in this case it must be solely upon the basis that he was a corporate officer and therefore had a vicarious criminal liability for any offenses committed by the corporation through its agents and employees.

A careful search of the record utterly fails to reveal that he committed any of the acts or participated in or aided and abetted in the commission of any of the acts which are alleged to have constituted the offenses charged in the indictment.

The evidence clearly shows that appellant was not physically present at the time the food was allegedly introduced into interstate commerce. He was not only not at the plant but was absent from the state. (Tr. 79, 280 and 284.)

A careful reading and consideration of the evidence clearly shows that appellant Paskey Dedomenico did everything within his power to see that no such offenses as charged in the indictment were committed. That he conducted his activities entirely within the scope and provisions of the Act at all times when he was present and directly in charge and responsible for the manufacturing processes used and the introduc-

tion of the product into interstate commerce. (Tr. 288)

It is an elementary principle of criminal law and indeed the very foundation of our criminal statutes that no individual can be held criminally liable under statutory prohibition unless the statute specifically and with reasonable certainty specified that he is one of those individuals to whom the prohibition applied. See Baty Vicarious Liability (1916) p. 218-219; *State v. Carmean*, 126 R. 291, 102 N. W. 97 (1905); and *Cotton Mill Co. v. People*, 32 Col. 263, 75 Pac. 924 (1904); *People v. England*, 27 Hun. 139 (N. Y. 1882); *Rex v. Hendrie*, 11 Ont. L. Rep. 202 (1905); *Rex v. Hays*, 13 Ont. L. Rep. 201 (1907); *U. S. v. Winslow*, 195 Fed. 578, aff'd in 227 U. S. 202, 57 L.Ed. 481, 33 S. C. 253 (1913).

This principle has been further enunciated and followed by the Federal Court in several jurisdictions. See *Union Pacific Coal Co. v. U. S.* (8th Cir. 1907) 173 Fed. 737, wherein the court states the rule:

> "A corporation is a person, within the meaning of this act. It is another and different person from any of its stockholders, whether they are corporations or individuals and no corporation can, by violating the law, make any one of its stockholders who does not himself participate in that violation, criminally liable therefor."

Also see *Shreiber v. Sharpless*, 6 Fed. 175;

Taylor v. Gilman, 64 Fed. 632, *Reynolds v. Hearst* (1899 Cal.) 95 Fed. 652, which cites with approval and follows the case of *Railway Co. v. Prentice*, 147 U. S. 101, 37 L. Ed 97, 13 Sup. Ct. 261. Counsel for the plaintiff cited and relied upon the case of *U. S. v. Dotterweich*, 320 U. S. 77, 64 S. Ct. 134, 88 L. Ed. 48 (1943) as holding to the contrary. However, a careful reading of this decision, which incidentally was a five to four decision, shows that the corporation and Dotterweich its president and general manager, were both charged with violations of the Federal Food, Drug and Cosmetic Act. A reading of the case clearly shows that in that case Dotterweich the individual defendant, aided, abetted, advised, encouraged, authorized and participated in the very acts of which he and the corporation were accused. As a matter of fact the jury found that the corporation itself had NOT committed the acts but that the corporate officer himself had. The decision of the court, and the case was decided entirely and solely upon the question of the guaranty provisions of Section 303 (c) of the Federal Food, Drug and Cosmetic Act.

Justice Murphy in the dissenting opinion observes:

> "It may be proper to charge him with responsibility to the corporation and the stockholders for

> negligence and mismanagement. But in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability upon an act in which the accused did not participate nor of which he had no personal knowledge. Before we place the stigma of a criminal conviction upon any such citizens the legislative mandate must be clear and unambiguous."

It is respectfully submitted that Congress has not acted and stated clearly and unambiguously that corporate officers shall be liable in their personal capacity and individually for the criminal acts of the corporation. The record of the proceedings in Congress and the legislative history of the Act, indicates that it was not the intention of Congress so to provide.

Section 2 of the 1906 Act, which was the predecessor to the 1938 Act under which the defendant Dedomenico was prosecuted, contained the provision which was introduced to the effect that any violation of the Act by a corporation should be deemed to be the act of the officer responsible therefor individually and such officer might be punished as though it were his own act. Senator Heyburn, who was a sponsor of the Act, stated that this provision was necessary and was intended to obviate the possibility of escape by officers of a corporation under their personal plea that they did not know what was being done or that it was the responsibility of the corporation. (40 Con-

gressional Record, p. 94). This is the identical plea of the appellant and defendant Paskey Dedomenico in this case and had this provision remained in the Act the plea would not be well taken.

In 1938 the framers of the Act in question herein were aware that the 1906 Act was deficient in that it failed to place responsibility properly upon corporate officers. (Senate Report 493, 73rd Congress, 2nd Session, p. 21). This report states as follows:

> "It is not, however, the purpose of this paragraph to subject to liability those directors, officers, and employees who merely authorize their subordinates to perform lawful duties and such subordinates on their own initiation perform those duties in a manner which violates the provisions of the law. However, if a director or officer personally orders his subordinates to do an act in violation of the law, there is no reason why he should be shielded from personal responsibility merely because the act was done by another or on behalf of the corporation."

In order to provide the necessary law to prevent the use of a corporate firm and fiction as a shield, the framers of the 1938 Act sought to insert in the Act the following provisions:

> "Whenever a corporation or association violates any provision of this Act, such violation shall also be deemed to be a violation of the individual, director or officer, who authorized, ordered, or directed any of the acts constituting in whole or in part such violation."

Had this been enacted and included in the 1938 Act then there could be no question, assuming that the above was constitutional, that the appellant Paskey Dedomenico would properly have been held and convicted for the offenses as charged under the Act. However, Congress deleted the above provision from the final version of the 1938 Act, thus clearly indicating that Congress did not intend to make an officer or director of a corporation responsible for the violation of the acts of another or for the violation of the corporation. See Senate 1944, 73rd Congress, First Session, S. 18 (b).

Congress can and has imposed liability on corporate officers and individuals in other situations. See Anti-Trust Laws, 15 U.S.C.A. Sec. 24; Bankruptcy Laws, 11 U.S.C.A.; and cases involving fraud under mortgage loans, 46 U.S.C.A.; and for liability of employees working under certain conditions, 45 U.S.C.A.

A careful reading of cases in which criminal liability has been imposed upon a corporate officer reveals that they have arisen in two cases: One where the corporate officer actively participates, aids, abets, advises, encourages the criminal offense and secondly where the corporation is organized solely as a front for the individual or for the purpose of committing

criminal acts or for the conducting of unlawful business or a nuisance such as the operation of a house of prostitution and the most common case reports involving the establishment of a corporation for the purpose of conducting bootlegging and moonshining activities. That is not the situation here, nor is it contended by the plaintiff that such was the corporate structure herein.

It is only by a very strained construction of the Act, by the court, which Congress never intended that the president or corporate officer of a corporation who personally had never actually participated in the criminal acts, who had never abetted, advised, encouraged, authorized or participated therein, could be held.

The fundamental rule of construction of acts of a penal nature is that they shall be very strictly construed. This principle was early enunciated in our jurisprudence by Chief Justice John Marshall in the case of *U. S. v. Wiltberger*, 5 Wheat. 76, 5 Law Ed. 337, 18 U. S. 76. This great jurist observes:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, nothwithstand-

> ing, this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. * * * That this is not a new independent rule which subverts the old. * * * The intention of the legislature is to be collected from the words they imply. * * * To determine that a case is within the intention of a statute its language must authorize us to say so."

This principle has become well established and has been cited with approval and followed in *McCollum v. Hamilton National Bank of Chatanooga*, 303 U.S. 248, 82 L.Ed. 822, 58 S.Ct. 570; *Osaka Shosen Kaisha Line v. U. S.* 300 U. S. 101, 81 L.Ed. 534, 57 S.Ct. 357; *U. S. v. Resnick*, 299 U. S. 209, 81 L.Ed. 129, 57 S.Ct. 127; *Asulo v. U. S.* 272 U. S. 628, 71 L.Ed. 445, 47 S.Ct. 202; *Boston Sand Co. v. U. S.* 278 U. S. 53, 73 L.Ed. 179, 49 S.Ct. 56; *U. S. v. Harris*, 177 U. S. 305, 44 L.Ed. 780, 20 S.Ct. 611; *Sarlls v. U. S.* 152 U. S. 570, 38 L.Ed. 556, 14 S.Ct. 720.

The rule is stated in 19 C.J.S. 931, page 363:

> "Officers, directors, or agents of a corporation may be criminally liable individually for individual acts done by them in behalf of the corporation. They cannot, in absence of a statute, be held as liable for acts in which they have not either actually participated or which they have not directed or permitted."

The earliest case is that th *Rex v. Hays*, supra, annotated in 8 Ann. Cas. 380-383. In that case the

charge was that the second vice-president and general manager of the railroad committed the offense while the findings were that the corporation had actually committed the offenses. The court held that in the absence of some clear statutory enactment that the defendant could not be punished for the default of his company. Justice Meredith observes the rule to be:

> "This case presents upon its face these extraordinary and illogical features: The company, and the company only, have been found guilty; and yet the individual, and the individual only, has been convicted. There is no power to make a criminal of one for the offenses of another * * * There is no excuse for his conviction for an offense found to have been committed by the company only * * * In order to make out a case against the defendant, it was necessary for the prosecution to show that he aided, abetted the commission of the offense, or counseled or procured it."

The annotation in 8 Ann. Cas. at 380 observes the rule as follows:

> "The question of the criminal liability of the officers of a corporation for its acts of nonfeasance or misfeasance seems seldom to have arisen. The weight of modern authority as nearly as it can be determined from the few reported cases, is apparently as laid down in the reported case, viz., That an officer of the corporation is not liable for an offense committed by the corporation, except where he has in some way participated in the illegal act, as an aider, abettor, or accessory."

The same rule has long been followed in the State

courts in the State of Washington and in the courts from other jurisdictions: *State v. Thomas*, 123 Wash. 299, 212 Pac. 253; *State v. Comer*, 176 Wash. 257, 28 Pac. (2d) 1027; (appeal dismissed in *Comer v. State of Washington*, 78 L.Ed. 1470); *State v. German*, 162 Ore. 166, 90 Pac. (2d) 185; *State v. Ross*, 104 Pac. 496; *State v. Parker*, 151 Atlantic 325; *Ledbetter v. State*, 104 So. 777; *People ex rel Billeci v. Klinger*, 300 N.Y.S. 408; *People v. Brainard*, 183 N.Y.S. 452; *State v. Lux*, 50 N.W. (2d) 290 (1952); *People v. International Steel Corporation* (Cal. 1951) 236 Pac. (2d) 587.

In a very recent case in 1944 of *U. S. v. Harvey* found in 54 Fed. Supp. 910, District Court of Oregon, the court held that the executive officers of the corporation which was the owner of a vessel could not be charged as principals for the acts and omissions of the captain, pilot, or other persons in charge of operating the vessel, and that it is necessary for the indictment to charge the corporation guilty of the offenses and that the officers aided, abetted or acted knowingly in the commission of the offenses.

A careful reading and analysis of every case reported and digested, both in the State courts and Federal courts, will disclose that there has never been a single instance in which the court has imposed crimi-

nal liability upon the corporate officers of a corporation for the criminal acts of a corporation. There is no recognition of a vicarious criminal liability under our system of jurisprudence. In every case in which the corporate officer was convicted the evidence clearly showed that he had actually performed the criminal acts himself or that the corporate officer participated in the performance of the criminal acts, or aided, abetted or advised in the performance thereof. The only exception to this is the situation wherein a statute specifically stated that corporate officers were liable for the offenses committed by the corporation. We find no such position in this legislative enactment by Congress and indeed as shown the history of the act herein involved Congress did not intend such to be the effect of their legislative enactment because they specifically deleted that portion from the final act as passed by them in 1938.

It is respectfully submitted that as to the appellant, the individual Paskey Dedomenico, the conviction branding him as a criminal should be set aside and reversed and the information dismissed. He has not committed any offense under the Act, and there is no provision under the Act making him liable solely by reason of the fact that he was an officer of the corporation. This respected business man, with his family, a leader in the community in which he lives and

onducts his business, should not be held as a criminal ecause of the acts of another.

The evidence is clear and overwhelming that he at ll times sought to comply with the provisions of the ct, and did so comply. The plant was cleaned when e left for California (Tr. 288) and was regularly leaned, disinfected and inspected by him or under his nstructions at all times (Tr. 285-289 and 297-300) hen he was present. He did not in any way aid, bet, advise, encourage, plan, procure or participate n any of the offenses of which he was charged.

V. CONCLUSION

In the light of the foregoing, appellants respectully submit that the Pure Food and Drug inspectors id not first make a request and obtain permission rom the owner, operator and custodian of the plant; nat the evidence which they obtained as a result of neir unauthorized entry and inspection was not adnissible; that Section 402 (4), Federal Food, Drug nd Cosmetic Act is unconstitutional because it was ague, ambiguous and indefinite and therefore conrary to the Sixth Amendment to the United States onstitution; that evidence which was submitted and ffered by the United States to show adulteration was nsufficient to sustain the convictions; that Counts III nd IV of the Indictment charged but one offense, and

Counts V and VI of the Indictment charged but one offense; that the conviction of the appellants on these counts constitutes double jeopardy; that the shipment of the products complained of in the indictment did not consist in whole or in part of a filthy substance within the meaning of Section 402 (a) 3 of the Federal Food, Drug and Cosmetic Act; that there was no evidence of filth and contamination within the meaning of the Act sufficient to sustain the convictions of the corporation and of the individual, Paskey Dedomenico; that the defendant appellant Paskey Dedomenico as an individual officer and president of the corporation did not aid or abet, participate or advise in any of the acts which may have constituted offenses under the Act; the evidence failed to show beyond a reasonable doubt that the individual appellant committed any act or had any intent to commit any act which may have constituted offenses as charged in the indictment; that the evidence is not sufficient to convict the appellant Paskey Dedomenico as an individual; that the president of a corporation such as the individual appellant Paskey Dedomenico cannot be held criminally liable in a prosecution for the criminal acts of another.

Even if the corporation and the individual appellant are found guilty as charged the fine is so excessive

as to indicate abuse of discretion on the part of the trial judge.

Appellants therefore pray that the judgment, conviction and sentences heretofore imposed by the trial court be set aside and that the indictment be dismissed as to each of the appellants, or in the alternative that appellants be granted a new trial by reason of the errors as set forth herein.

Respectfully submitted,

POMEROY, YOTHERS,
LUCKERATH & DORE
ROBERT A. YOTHERS
of counsel

Attorneys for Appellants

304 Spring Street
Seattle, Washington

No. 13713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD P. MURPHY, *Judge*

APPELLEE'S BRIEF

CHARLES P. MORIARTY
United States Attorney
Attorney for Appellee
Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

J. CHARLES DENNIS
Of Counsel

ARTHUR A. DICKERMAN,
Attorney
Department of Health, Education, and Welfare
1401 South Hope Street, Room 514
Los Angeles 15, California

BALLARD NEWS, SEATTLE, WASHINGTON — 8/20/53 — 45 COPIES

No. 13713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD P. MURPHY, *Judge*

APPELLEE'S BRIEF

CHARLES P. MORIARTY
United States Attorney
Attorney for Appellee
Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

J. CHARLES DENNIS
Of Counsel

ARTHUR A. DICKERMAN,
Attorney
Department of Health, Education, and Welfare
1401 South Hope Street, Room 514
Los Angeles 15, California

BALLARD NEWS, SEATTLE, WASHINGTON — 8/20/53 — 45 COPIES

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

Page

Page

STATUTES

MISCELLANEOUS

No. 13713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD P. MURPHY, *Judge*

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

Pursuant to 21 U.S.C. 331(a), 21 U.S.C. 333(a), and 18 U.S.C. 3231, the District Court has jurisdiction to try the defendants-appellants.

Under 28 U.S.C. 1291, this Court has authority to review the judgments of the District Court.

II

STATEMENT OF FACTS

The six-count Indictment[1] in this case charged the defendants, Golden Grain Macaroni Company, Inc., and Paskey Dedomenico, with violating the Federal Food, Drug, and Cosmetic Act by causing adulterated foods to be introduced into interstate commerce. (R. 3-12). More specifically, the Indictment charged that the foods involved consisted in part of a filthy substance such as insect larvae or insect fragments [21, U.S.C. 342(a) (3)], and had been prepared, packed, and held under insanitary conditions whereby they may have become contaminated with filth [21 U.S.C. 342(a) (4)].

The Golden Grain Macaroni Company is a corporation organized under the laws of the State of California, doing business at Seattle, Washington. (R. 23). Paskey Dedomenico is president of this corporation and general manager of its Seattle plant. (R. 23, 284).

Golden Grain manufactures and sells cut macaroni, elbow macaroni, spaghetti, thin spaghetti, and

---

[1] Since the trial court found each of the defendants *not guilty* as to Count 1, and guilty as to the remaining Counts (R. 13, 15), we shall consider only Counts 2-6 in this brief.

other similar products. The evidence established, and it is now conceded, that both defendants were responsible for each of the interstate shipments of food as alleged in Counts 2-6. (Appellants' Br. 2-3).[2]

Food and drug inspectors obtained samples from each of these shipments and portions of the samples were analyzed for filth content by Government witness Robert T. Elliott, chemist for the U. S. Food and Drug Administration, and by defense witness John Spinelli, chemist for the Food Chemical and Research Laboratory. (Appellants' Br. 2-3). Both chemists used the same methods of analysis, namely, those published by the Association of Official Agricultural Chemists. (R. 173-4, 233). Both chemists found insects or larva fragments and other foreign matter in each sample, though Mr. Spinelli examined smaller portions and found a numerically smaller amount of foreign material. (R. 156-160, 235-239).

The conditions of sanitation which prevailed at defendants' Seattle plant during June and July of 1951 — the period when the food in question was

---

[2] However, in another portion of their brief, appellants contend that the individual defendant was away from the plant when the shipments were made and is therefore not *criminally* responsible for those acts. (Appellants' Br. 51-63). We shall discuss this point in our argument.

manufactured — were described by former and present employees of the company as well as by inspectors of the Food and Drug Administration.

Mrs. Laura Shoop had been with the firm for 7½ years, cutting and packing spaghetti. (R. 63-64). She testified that a great many times she observed insects such as moths, millers, and little worms on the noodle-drying trays and in the spaghetti-drying room. (R. 65, 67). While the firm used spraying methods to attempt to control the insects, she didn't think "they ever got those little worms down around the edges" of the trays. (R. 67). On cross-examination, when asked how many moths she saw in June and July of 1951, she testified she had seen "a big lot of them" and that "nearly everything you turned over you could find some of them." (R. 69). When she reported the presence of the moths to the foreman, Mr. Mulvaney, "he wouldn't do anything as a rule." (R. 70). Also on cross-examination, when asked whether she would say the plant was unsanitary in June and July of 1951, she said, "Oh yes," basing her answer on the presence of the moths. (R. 71).

Mrs. Colleen Dicecco worked for the Golden Grain Macaroni for a few months in 1951, leaving the end of June or the beginning of July. (R. 106). In describing her duties, she testified: "We had to pack

macaroni and the macaroni and spaghetti that fell on the floor we had to pick up and put back into the machine and pack that too." (R. 106).

Food and Drug Inspectors, Fred Shallit and Horace A. Allen, inspected the Seattle plant of the Golden Grain Macaroni Company on July 18 and 19, 1951, and on July 31, 1951. (R. 78, 112). On arriving at the plant on July 18, they spoke to the receptionist, identifying themselves and asking for Paskey Dedomenico. She stated Mr. Dedomenico was in California. When Mr. Shallit requested permission to make an inspection, the receptionist told him *"that Mr. McDiarmid was in charge of the plant, but that he wasn't in, either, but was expected down very shortly."* (R. 79). When Mr. Shallit then asked who might grant permission to make the inspection, she said she would inquire from Mr. Joe Mulvaney. She left and returned shortly informing the inspectors "that Mr. Mulvaney didn't feel that he had authority to grant * * * permission to make the inspection." (R. 80).

The inspectors then waited about 35 minutes for Mr. McDiarmid who readily granted permission to make the factory inspection.[3] (R. 80).

---

[3] Appellants deny that Mr. McDiarmid had authority to grant this permission, and contend that the evidence obtained by the inspectors on July 18 and 19 was not admissible. (Appellants' Br. 8-14). We shall consider these matters in our argument.

In Mr. Shallit's extensive testimony, corroborated by that of Mr. Allen (R. 152), he meticulously described the inside appearance of the building including the flour storage bin, the conveying system, and the manufacturing and drying equipment. (R. 86-150).

Everywhere there were live or dead moths, live larvae, insect webbing, and pupae. For example, by removing the wood housing on one of the screw conveyors in the plant's conveying system which transports flour from the storage bins to the machinery, Mr. Shallit was able to count 15 live moths as well as about 50 pupae, and he also observed insect webbing and live larvae. (R. 87). This condition was photographed. (R. 88; Plaintiff's Ex. 11). In another elevator, he saw 6 live moths and 50 larvae. (R. 98). When he removed the plate cover from a section of a screw conveyor, he found 2 live moths, larvae, and insect webbing adhering to the cover, and he noted one live moth and insect webbing directly in the conveyor in contact with the flour. (R. 93). This scene was photographed. (Plaintiff's Ex. 14). When he examined the dough kneader of the noodle-manufacturing equipment, it was empty, but adhering to the grease at the bottom of the kneader were 10 dead moths. (R. 101).

On a wall within a few feet of the main flour-storage bin, there were approximately 400 moth pupae or cocoons. (R. 96; Plaintiff's Ex. 15).

In the noodle-drying room, Mr. Shallit saw one tray with noodles containing two live moths on the noodles. (R. 107-108; Plaintiff's Ex. 20). He found insect webbing in the corners of each 6 trays with noodles that he examined. (R. 109).

In the enrichment tank, where vitamin tablets are dissolved for subsequent use in the manufacture of vitamin-enriched products, Mr. Shallit detected 4 dead moths in a yellowish liquid at the bottom of the tank. (R. 103; Plaintiff's Ex. 18).

During the inspection of July 18 and 19, Mr. Shallit obtained physical specimens of moths, larvae, webbing, etc., taken from various parts of the plant and its equipment. These are in evidence. (Plaintiff's Ex. 21-26). In his testimony, Mr. Shallit explained the source of each such specimen. (R. 115-118).

On July 31, 1951, Mr. Shallit and Mr. Allen re-visited the plant. (R. 112). Mr. Dedomenico was present; they spoke to him for about an hour, telling him of their findings on the previous inspection of July 18 and 19. (R. 112). When they asked for permission to make another inspection, Mr. Dedomenico told them to go ahead and make it. (R. 113). The

inspectors then examined the plant and its equipment again though not in as much detail as before. (R. 114). There were still live moths present, together with insect webbing, dead moths, and larvae, but the evidence of insect filth was not as impressive as on the previous inspection. (R. 114).

The moth problem encountered by the inspectors on July 18 and 19 had existed for some period prior to that time because it takes a period of about 9 weeks for flour moths to pass through the life cycle from egg to adult. (R. 140-141); Defendants' Ex. A-2, p. 4). Mr. Shallit counted approximately 100 or more adult moths in the plant. (R. 141).

One of the witnesses called by the defense was Joseph W. Mulvaney, foreman of the plant for 6 years. He agreed that the flour moth "is the big problem." (R. 204). Live moths were always present, sometimes worse than others. (R. 213). He was with the inspectors part of the time on July 18 and 19, and in view of their findings he agreed with their suggestion that the flour-conveying system should be cleaned before being used again. (R. 212, 113). The mass of cocoons on the wall (Plaintiff's Ex. 15) was "quite visible" to him. (R. 212).

Defendants waived a jury and were tried by the District Court. (R. 307). On December 8, 1952, the

Court entered a judgment for each defendant, finding each defendant not guilty as to Count 1 but guilty as to Counts 2, 3, 4, 5, and 6. (R. 13-16). The corporate defendant was sentenced[4] to pay a fine of $5,000. (R. 14). The individual defendant was sentenced to pay a fine of $5,000, and the Court suspended the imposition of sentence as to imprisonment on Counts 2, 3, 4, 5, and 6 for a three-year period of probation. (R. 15-16).

On January 13, 1953, the District Court filed an Order Denying Motion for New Trial. (R. 308). On January 14, 1953, both defendants filed a Notice of Appeal. (R. 17). On motion of appellants, the District Court issued an Order to Stay Execution of the judgments during the pendency of this appeal. (R. 20).

---

[4] Both defendants had been convicted of prior violations of the Federal Food, Drug, and Cosmetic Act (R. 180-181; Plaintiff's Ex. 27), and were therefore subject to the heavier penalties provided for by 21 U.S.C. 333(a).

III

STATUTORY PROVISIONS INVOLVED

FEDERAL FOOD, DRUG, AND COSMETIC ACT:

"21 U.S.C. 342. Adulterated Food

"A food shall be deemed to be adulterated—

"(a)(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or

"(a)(4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;"

"21 U.S.C. 331. Prohibited Acts

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"21 U.S.C. 333. Penalties—Violation of Section 331

"(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to impris-

onment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

"21 U.S.C. 372. Examinations and Investigations — Authority to Conduct

"(a) The Secretary is authorized to conduct examinations and investigations for the purposes of this chapter through officers and employees of the Department or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department * * *"

"21 U.S.C. 374. Factory Inspection

"For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce * * *; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein."

IV

QUESTIONS PRESENTED

(1) Is there substantial evidence in the record to support the judgments of the District Courts?

(2) Was the evidence of moth infestation and

other insanitation at defendants' plant admissible?

(3) Is that section of the Federal Food, Drug, and Cosmetic Act void for uncertainty which declares a food to be adulterated if it is prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth?

V

SUMMARY OF ARGUMENT

A. THE JUDGMENTS OF THE DISTRICT COURT MUST BE SUSTAINED IF THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THEM

Appellants challenge the sufficiency of the evidence upon which they were convicted. This Court will not reweigh the evidence, and the judgments of the trial court must be sustained if there is substantial evidence to support them, taking the view most favorable to the Government.

B. THE EVIDENCE WHICH SUPPORTS THE JUDGMENTS OF THE DISTRICT COURT IS NOT ONLY SUBSTANTIAL BUT OVERWHELMING

The judgments of the trial court are supported by substantial evidence of the most compelling character.

Mr. Robert T. Elliott, a chemist called by the

Government, has had extensive experience in the examination of foods for filth. He analyzed samples of each of the foods in question and found them all to be seriously contaminated with filth such as larvae or insect fragments, moth scales, larva capsules, etc.

Mr. John Spinelli, a chemist who testified for the defense, found insect fragments in each of the samples. He also found several pieces of larvae in one sample, mold in another, and a moth scale or part of a moth in a third.

The word "filthy" as used in 21 U.S.C. 342(a)(3) has its usual and ordinary meaning rather than any scientific or medical definition. A food may be deemed to contain a "filthy" substance if the presence of that substance in the food makes the thought of eating such food disgusting to the ordinary American consumer.

Where the Government alleges that a food is adulterated within the meaning of 21 U.S.C. 342(a)(3) by reason of the presence of a filthy substance, it is not incumbent upon the Government to prove that the product is "unfit for food" or "injurious to health."

One of the objectives of 21 U.S.C. 342(a)(3) is to protect the aesthetic tastes and sensibilities of the consuming public.

Where a food is alleged to be adulterated in more than one respect, proof that it is adulterated in *any one* respect is sufficient to sustain a conviction. Hence, the judgments of the District Court could rest upon the showing that filthy substances were present in violation of 21 U.S.C. 342(a)(3).

But there is also substantial and impressive evidence that each food was prepared, packed, and held under insanitary conditions whereby it may have [and actually did] become contaminated with filth—and was consequently adulterated in violation of 21 U.S.C. 342(a)(4).

C. THE EVIDENCE OF INSANITATION AT FACTORY WAS ADMISSIBLE

Testimony as to insanitary conditions at defendants' factory was elicited from witnesses produced by both sides, including present and former employees of defendants as well as food and drug inspectors.

Appellants object to the admissibility of part of the inspectors' testimony on the ground that permission to inspect was not granted by the "custodian" of the plant. But the trial court held on the basis of substantial evidence that the person who granted permission *was* the "custodian."

Moreover, it is our position that the factory in-

spection evidence was obtained freely and voluntarily with the permission of a responsible representative of the firm held out as "in charge of the plant" in the absence of the general manager. It is immaterial whether that representative was the "custodian" within the meaning of 21 U.S.C. 374 or not.

Under 21 U.S.C. 372(a), the Secretary of the Department of Health, Education, and Welfare has broad authority to conduct examinations and investigations. Any information that is obtained in the course of such an investigation without fraudulent or other improper methods is admissible in any enforcement action under the Federal Food, Drug, and Cosmetic Act.

A Corporation has no privilege against self-incrimination.

There was a substantial and reasonable basis for the trial court's conclusion that insanitary conditions prevailed at the plant in June and July of 1951, and may well have contaminated the products in question with filth.

D. 21 U.S.C. 342(a)(4), WHICH DECLARES A FOOD TO BE ADULTERATED IF IT IS PREPARED, PACKED, OR HELD UNDER INSANITARY CONDITIONS WHEREBY IT MAY HAVE BECOME CONTAMINATED WITH FILTH, IS NOT VOID FOR UNCERTAINTY

Appellants challenge the constitutionality of Section 342(a) (4). This issue was neither presented to nor passed upon by the trial court. Such questions will ordinarily not be considered on appeal.

The Court of Appeals for the Eighth Circuit has recently sustained the constitutionality of this Section in an exhaustive opinion which considered and rejected arguments similar to those here advanced.

E. MISCELLANEOUS POINTS

1. The Individual Defendant Was Criminally Responsible

The individual defendant was president of the corporation and in over-all charge of the plant. While he was away from the plant during some of the times in question, he was present when one of the foods was manufactured and packed, and when two others were shipped.

The criminal responsibility of a corporate officer or general manager of a firm under the Federal Food, Drug, and Cosmetic Act does not hinge upon his physi-

cal presence or participation in the violative acts. Where such acts are done in the name of a corporation, the offense is committed by all who have a responsibile share in the furtherance of the transaction which the statute outlaws.

The evidence here supports the trial court's conclusion as to the criminal responsibility of the individual defendant.

2. Appellants Were Not in Double Jeopardy

Appellants argue that several of the Counts present the question of double jeopardy. This issue was not mentioned in the trial court and for that reason would ordinarily not be considered here. Moreover, the privilege against double jeopardy must be claimed seasonably. When not asserted until appeal, it is deemed waived.

Each Count involves a separate food — thus, Count 3 relates to elbow macaroni and Count 4 to spaghetti. While both foods were shipped at the same time to the same consignee, they are separate foods, and distinct evidence was required to establish the adulterated character of each.

Section 331(a) prohibits the introduction of any adulterated food into interstate commerce, not the introduction of any shipment of adulterated foods. For each separate adulterated food—e.g., elbow mac-

aroni or spaghetti—there is a separate offense, though both are part of one shipment.

3. The Fines Imposed Are Within the Statutory Limits and Not Subject to Attack on Review

Each defendant was subject to a total maximum fine of $10,000 on each of 5 counts—or $50,000. The Court imposed a fine of $5,000 on each defendant. Since these fines are within the statutory limits, no error was committed.

4. The Trial Court Committed No Error in Its Rulings on the Filth Question

Where a court believes itself to be sufficiently advised as to the law, it has the right to refuse to hear counsel further on questions of law.

VI

ARGUMENT

A. THE JUDGMENTS OF THE DISTRICT COURT MUST BE SUSTAINED IF THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THEM

The appellants were tried and convicted by the District Court sitting without a jury. Appellants now challenge the sufficiency of the evidence upon which they were convicted. Under such circumstances, the function of the Appellate Court is clear.

"It is not for us to weigh the evidence or to de-

> termine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."
> *Glasser v. United States* (1942), 315 U.S. 60, 80; *Woodard Laboratories, Inc., et al. v. United States* (C.A. 9, 1952), 198 F. (2d) 995, 998.

In *Henderson v. United States* (C.A. 9, 1944), 143 F. (2d) 681, this Court said at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution * * *"

While appellants are aware of the existence of these rules governing appellate review (Appellants' Br. 29), the entire tenor of their brief insofar as it deals with the facts is to the effect that this Court should reweigh the evidence and emerge with conclusions different from that of the District Court.

B. THE EVIDENCE WHICH SUPPORTS THE JUDGMENTS OF THE DISTRICT COURT IS NOT ONLY SUBSTANTIAL BUT OVERWHELMING

The judgments of the District Court, we submit, are supported by substantial evidence of the most compelling character.

Mr. Robert T. Elliott, now retired from the Government service, was a chemist with the Food and Drug Administration for 33 years; for the most part, his work related to the examination of foods. (R. 153). During the ten years preceeding his testimony, he examined an estimated 200-300 samples of products of the type here in question, each sample consisting of 1-12 units and each unit being examined separately. (R. 160-161). He found many such samples entirely free from filth, using the same methods of analysis he employed in this case. (R. 178-179).

Mr. Elliott analyzed samples taken from each of the shipments of finished products described in the Indictment (R. 154-160), and he also examined samples of the raw flour materials which had been obtained from defendants' plant. (R. 161-164; 146-150). The methods of analysis which he used are those approved and published by the Association of Official Agricultural Chemists. (R. 173-174). These same methods were employed by Mr. John Spinelli, a chemist whom defendants called as a witness. (R. 233). Mr. Spinelli had been employed as a chemist for 3½ years during which time he had made a total of about 40 determinations for filth in spaghetti and macaroni. (R. 256-257).

For the convenience of the Court, we append two

charts to show the filth findings of each chemist with respect to the samples involved in Counts 2-6. *Appendix A* relates to the determinations made by Mr. Elliott, and *Appendix B* relates to the determinations made by Mr. Spinelli. When it is considered that Mr. Spinelli used smaller portions of the samples for his analysis, it becomes apparent that his finding are not far different from those of Mr. Elliott.

All of the insect or larva fragments which Mr. Elliott found were embedded within the finished product. (R. 160). However, in one of the samples Mr. Spinelli examined, he found a "couple of pieces of larvae that were not embedded in the product" and were visible to the naked eye. (R. 235-236). Mr. Spinelli also found evidence of mold in another sample. He stated that mold should not develop if the product is in good condition. (R. 236-237).

Mr. Elliott found a substantial number of moth scales and moth fragments in each sample of finished product that he analyzed.[5] (154-160; 171-172). He found no moth evidence in the raw materials he examined. (R. 164). There is thus presented an impelling correlation between the evidence of moth infestation in the plant (described earlier in our "State-

[5] Mr. Spinelli found a moth scale in one sample and possibly some moth larva parts in another. (R. 259, 261-262).

ment of Facts") and moth contamination of the finished products, the conclusion being obvious that such products "were prepared, packed [and] held under insanitary condition whereby [they] may have [and actually did] become contaminated with filth." 21 U.S.C. 342(a)(4).

A significant bit of testimony brought out through Mr. Spinelli is the fact that the analytical procedure "digests" the internal part or soft tissues of the larva or moth. (R. 260). Consequently, while the harder fragments may be recovered and counted by the analyst, *the softer body parts which were also necessarily present in the macaroni or spaghetti are not recovered.*

At the trial of the case affirmed under the name *338 Cartons * * * of Butter v. U. S.* (C.A. 4, 1947), 165 F. (2d) 728, 731, the jury was instructed "that if it found the hard parts of an insect's body in the butter, the normal inference would be that the soft parts of the insects were also in the butter." And the Court of Appeals there sustained the judgment of the District Court that such butter could not be salvaged for human consumption by reworking it so as to remove the *hard* filthy parts. The Court noted that there "is no scientific method by which the insect fat or oil could even be detected in the finished

product since it had become amalgamated with the butter fat," and the Court also rejected the argument (at page 731) that the insect fat present in the butter after reprocessing would be so infinitesimal that it could not contaminate it. The Court observed that there is "no tolerance for filth in butter," and we might add that there is no tolerance for moth in macaroni.

The statutory provision especially applicable to the testimony of the chemists is 21 U.S.C. 342(a)(3) which declares:

> "A food shall be deemed to be adulterated if it consists in whole or in part of *any* filthy, putrid, or decomposed substance, or if it is otherwise unfit for food." (Italics added).

Appellants seem to argue that the insect fragments and other foreign material in their products were present in such small amounts as not to be within the meaning of the term "filthy substance" as used in the statute. (Appellants' Br. 36-42).

But the cases they cite actually support the Government's position. We have already discussed the case of *338 Cartons * * * Butter v. U. S.* (C.A. 4, 1947), 165 F. (2d) 728. In *Triangle Candy Co. v. U. S.*, (C.A. 9, 1944), 144 F. (2d) 195, 199-200, this Court held that the presence of two small rodent hairs in one one-pound sample, and the presence of two ro-

dent hairs and three insect larva and fragments in another three-pound sample, were sufficient to sustain a conviction as to one of the Counts. As this Court pointed out in construing a comparable provision under the predecessor Food and Drug Act of 1906—in *A. O. Andersen & Co. v. U. S.* (C.A. 9, 1922), 284 Fed. 542, 545:

> "It appeared from the cross-examination of the government witnesses that they have heretofore suffered canned salmon containing a small percentage of filthy, decomposed, or putrid matter to pass in interstate commerce unchallenged, *but there is no room for controversy over percentages under the statute itself, for it excludes all.*" (Italics added).

As appellants recognize, the word "filthy"—used in 21 U.S.C. 342(a)(3)—has been uniformly construed to have its usual and ordinary meaning rather than any scientific or medical definition. (Appellants' Br. 39). Note also *U. S. v. Roma Macaroni Factory, et al.*, (N.D. Calif., 1947), 75 F. Supp. 663, 665. The following definitions are taken from Webster's New International Dictionary (2nd Ed., Unabridged, 1948):

"filth: * * *

2. Foul matter; anything that soils or defiles disgustingly."

"filthy: * * *

1. Defiled with filth, whether material or

moral; nasty; disgustingly dirty; polluting; foul; impure * * *

2. * * * disgusting * * *"

We submit that a food may be deemed to contain a "filthy" substance if the presence of that substance in the food makes the thought of eating such food disgusting to the ordinary American consumer. We further submit that macaroni or spaghetti contains a "filthy" substance if among its ingredients are moth fragments and larvae, moth scales, the soft parts of moth bodies, etc.

Appellants attempt in yet another way to devitalize the effect of 21 U.S.C. 342(a)(3). Thus they contend that before a food which contains a filthy substance may be considered adulterated within the meaning of that section, the Government must establish that the food is "unfit for food" and is also "injurious to health." (Appellants' Br. 42-49).

Both of these contentions have been often raised and uniformly rejected. There are other subdivisions of Section 342(a) which specify as conditions of adulteration of foods that they be "deleterious," "injurious to health," "the product of a diseased animal," etc. These specified characteristics thus become essential prerequisites to be proved in cases brought under those subdivisions. But in the first clause of subdivision

(3), the ban against foods consisting in whole or in part of any filthy, putrid, or decomposed substance reveals a Congressional determination that the presence of filth, putridity, or decomposition in a food product is itself sufficient to justify the exclusion of the product from the channels of interstate commerce. That being so, it is *no part* of the Government's case to establish that a product, which is proceeded against under Section 342(a)(3), not only consists in whole or in part of a filthy, putrid, or decomposed substance, but in addition contains an amount or type of filth such as makes it unfit for food or deleterious to health. This has been the consistent interpretation of the courts. *Bruce's Juices, Inc. v. U. S.*, (C.A. 5, 1952), 194 F. (2d) 935, 936; *Salamonie Packing Co. v. U. S.*, (C.A. 8, 1948), 165 F. (2d) 205, 206, cert den. 333 U.S. 863; *U. S. v. 1851 Cartons * * * Whiting Frosted Fish*, (C.A. 10, 1945), 146 F. (2d) 760, 761; *U. S. v. 935 Cases * * * Tomato Puree*, (N.D. Ohio, 1946), 65 F. Supp. 503, 504; *U. S. v. Lazere*, (N.D. Iowa 1944), 56 F. Supp. 730, 732; *U. S. v. 184 Barrels Dried Whole Eggs*, (E.D. Wis., 1943), 53 F. Supp. 652, 656.

Noteworthy is the reliance placed by many of these courts on the views expressed by this Court in *A. O. Andersen & Co. v. U. S.*, (C.A. 9, 1922), 284 Fed. 542, 544, in similarly construing a comparable

provision under the predecessor Food and Drugs Act of 1906. Yet appellants now ask that all these cases be overruled.

The legislative history of the Federal Food, Drug, and Cosmetic Act of 1938 clearly supports our position. Section 7, Sixth, of the predecessor Food and Drugs Act of 1906, 34 Stat. 769, 21 U.S.C. (1934 ed.) 8, declared that an article of food should be deemed to be adulterated if it consisted "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance * * *". Under the 1906 statute, the courts uniformly held that a food containing a filthy or decomposed substance was adulterated regardless of whether it was fit for human consumption or deleterious to health. *United States v. Two Hundred Cases, More or Less, of Canned Salmon,* (S.D. Tex., 1923), 289 Fed. 157, 158; *Knapp et al v. Callaway,* (S.D. N.Y., 1931), 52 F. (2d) 476, 477; *United States v. Two Hundred Cases of Adulterated Tomato Catsup,* (D. Ore., 1914), 211 Fed. 780, 782-783; *United States v. 462 Boxes of Oranges,* (D. Colo., 1918), 249 Fed. 505, 506; *United States v. 133 Cases of Tomato Paste,* (E.D. Pa., 1938), 22 F. Supp. 515. 516.

The first clause of 21 U.S.C. 342(a)(3) in the Act of 1938 follows closely the corresponding provision of the earlier statute, and it is obvious that Con-

gress intended that the provision should have the same meaning in the new law.[6] The plain inference to be drawn from this history is that the second clause of Section 342(a) (3) "or if it is otherwise unfit for food" was added to reach foods which are unfit for human consumption for reasons other than that they contain filthy, putrid or decomposed substances.[7] This, we submit, is the meaning of the word "otherwise" in the second clause. And this construction of subdivision (3) comports with and furthers the express Congressional intention to preserve in the present law the best features of the 1906 Act and at the same time to "strengthen and extend that law's protection of the consumer." S. Rep. No. 152, 75th Cong., 1st Sess., p. 1; see also H. R. Rep. No. 2139, 75th Cong., 3d Sess., p. 1; *United States v. Dotterweich*, 320 U.S.

---

[6] See S. Rep. No. 361, 74th Cong., 1st Sess. p. 7: "The provisions of Section 301(a)(3) and (5) [which subsequently were incorporated into Section 402(a)] dealing with filthy food and food from diseased animals, are essentially the same as those of the present law."

[7] Examples of foods unfit for human consumption for reasons other than filth, putridity, and decomposition are potatoes with a musty taste and odor, tough fish roe, stringy asparagus, etc. *United States v. 24 Cases * * * Herring Roe*, (D. Me. 1949) 87 F. Supp. 826, and see "Otherwise Unfit for Food—a New Concept in Food Adulteration," 4 Food Drug Cosmetic Law Quarterly, December 1949, p. 552.

277, 280, 292 (1943); *U. S. v. 1851 Cartons * * * Whiting Frosted Fish*, (C.A. 10, 1945), 146 F. (2d) 760, 761.

Finally, appellants assert that it was not the Congressional intent to protect the aesthetic senses of the public by enacting Section 342(a)(3). This is contrary to the entire import of that Section and of all the cases we have just been discussing. In *U. S. v. 133 Cases of Tomato Paste.* (E.D. Pa., 1938), 22 F. Supp. 515, 516, the Court said of the comparable provision in the Act of 1906:

> "There can be no doubt that this section of the act was designed to protect the aesthetic tastes and sensibilities of the consuming public * * *"
>
> * * *
>
> "The consumer ordinarily requires no governmental aid to protect him from the use of food products the filthy adulteration of which he can see, taste, or smell. What he really needs is government protection from food products the filthy contamination of which is concealed within the product."

For these reasons, we submit that there is most substantial evidence in support of the conclusion that the articles of food in question were adulterated within the meaning of 21 U.S.C. 342(a)(3), and that there is no reversible legal flaw in the judgments of conviction thereon.

It is well established that if an article is alleged

to be adulterated or misbranded in more than one respect, proof that it is violative in any one respect is sufficient to sustain a conviction. *Goodwin et al v. U. S.*, (C.A. 6, 1924), 2 F. (2d) 200, 201; *U. S. v. One Device, Intended For Use As a Colonic Irrigator*, (C.A. 10, 1947), 160 F. (2d) 194, 200; see also *Crain v. U. S.*, 162 U.S. 625, 636 (1896); *Frederivk v. U. S.*, (C.A. 9, 1947), 163 F. (2d) 536, 544, cert. den. 332 U.S. 775. Consequently, the judgments of the District Court could rest upon the established violations of Section 342(a)*(3)* alone.

However, equally substantial and impressive is the evidence adduced to demonstrate that each shipment in Counts 2-6 was also adulterated within the meaning of 21 U.S.C. 342(a) *(4)* in that the food in question was prepared, packed, and held under insanitary conditions whereby it may have become contaminated with filth. In our "Statement of Facts", we have discussed this evidence in some detail. It is based upon the testimony of present and former employees as well as that of food and drug inspectors.

Appellants raise constitutional and other objections to the admissibility of the inspectors' testimony. We shall take up these points in subsequent parts of this brief.

C. THE EVIDENCE OF INSANITATION AT THE FACTORY WAS ADMISSIBLE

We have already shown that evidence of insanitation at appellants' plant was elicited through the testimony of present and former employees of the firm as well as through the testimony of food and drug inspectors who inspected the premises on July 18 and 19, and on July 31, 1951. (See "Statement of Facts," above.) Appellants' object only to the admissibility of *part of the inspectors' testimony*, namely that relating to their observations on July 18 and 19. (Appellants' Br. 9-14 and 27-29).

There is no objection as to the testimony of the employees or to that of the inspectors with respect to their findings on July 31 except on the ground that Section 342 (a) (4) is void for uncertainty which we shall discuss in part D of this argument. Such evidence, standing alone, we submit is sufficient to sustain conviction on the charge of adulteration under 21 U.S.C. 342 (a) (4) in Counts 2-6. But it is our position that the inspectors were properly permitted to testify regarding their visit to the plant on July 18 and 19, and that the trial court was eminently correct in overruling defendants' objections.

These objections, renewed and amplified by ap-

pellants in this Court, are based upon an invalid syllogism:

(1) The statute which was then in effect, 21 U.S.C. 374,[8] required that an inspector obtain permission from the "owner, operate, or custodian" before entering and inspecting the plant.

(2) The inspectors in this case did not obtain permission from the "owner, operator, or custodian" before making the inspection of July 18 and 19.

(3) The inspectors' "failure" to obtain permission from the "owner, operator, or custodian" precludes the admissibility of their testimony with respect to their inspection of July 18 and 19.

But the trial court ruled that Mr. McDiarmid, who was the sales manager of the Golden Grain Macaroni Company and who gave the inspectors permission to make their inspection on July 18 and 19, *was the custodian of the plant at that time.* (R. 82). Appellants say this ruling was error. (Appellants' Br. 11-14). Is there substantial evidence to support the ruling, assuming it was necessary that Mr. McDiar-

---

[8] Effective August 7, 1953, this provision was amended to eliminate the need for obtaining permission and to include certain other safeguards to assure reasonableness of inspection. In *Appendix C*, we have set forth this amendment in full.

mid be the custodian if the inspectors' testimony regarding the inspection of July 18 and 19 were to be admissible?

When Inspectors Shallit and Allen arrived at the plant the morning of July 18, 1951, Mr. Shallit spoke to an office girl, identified himself as an inspector, and showed his credentials. (R. 79). Mr. Shallit's conversation with the office girl, as related by him without refutation, though the office girl was still in the employ of the defendants as a receptionist (R. 185), marks out a significant support for the Court's ruling:

> "I asked if Mr. Paskey Dedomenico was in. She said no, he wasn't in; that he was down south. I believe she said California, that he had been gone for approximately two (2) weeks and would be back shortly, within a week or so. I then requested permission to make an inspection. *She said that Mr. McDiarmid was in charge of the plant, but that he wasn't in either, but was expected down very shortly.* I asked then who might grant me permission to make the inspection. She said she would inquire from Mr. Joe Mulvaney. We waited downstairs and she reappeared a few moments later and told us that *Mr. Mulvaney didn't feel that he had authority to grant us permission to make the inspection.* She said, though, that Mr. McDiarmid would be down shortly. We thanked her and told her we would return within about a half (½) hour, which we did. We left the plant and returned approximately a half (½) hour later.
>
> "We entered the plant again the same way.

This time she said that Mr. McDiarmid had not arrived yet, but would we kindly wait in a rear office. We went to that office, and within five (5) minutes after the second visit Mr. McDiarmid did appear.

"We introduced ourselves again. *He seemed to know us.* He shook hands with each of us, very friendly. *We stated we would like to make a factory inspection. He said, "Go right ahead, boys."* I believe those were his words, and he also said that if we needed any help too, for us to let him know. (R. 79-80). (Italics added).

During one of the colloquies between defense counsel and the Court, the following remarks were made:

"THE COURT: You say McDiarmid was the sales manager?

"MR. YOTHERS: Yes, sir.

"THE COURT: Wasn't he the ranking man in charge of the plant?

"MR. YOTHERS: *He was the ranking man.* He was not in charge of the plant, your Honor. There is no testimony that he was." (R. 81). (Italics added).

Mr. Kenneth E. Monfore, Chief of the Seattle District of the Food and Drug Administration, testified regarding an administrative hearing which he held on January 17, 1952, with respect to the violations subsequently made the basis for the Indictment in this case. (R. 54 ff). Mr. Dedomenico and Mr. McDiarmid appeared at the hearing. (R. 56). Mr. Mc-

Diarmid stated at the hearing that he was sales manager of the Seattle plant and acted as manager of the plant in the absence of Mr. Dedomenico. (R. 57, 59; Plaintiff's Ex. 8, page 1, last paragraph). At the conclusion of the hearing, Mr. Monfore, in the presence of Mr. Dedomenico and Mr. McDiarmid, dictated a statement as to what they had said; he then asked them whether this statement represented a true report of the hearing and they agreed that it did. (R. 62-63). This statement is in evidence. (Plaintiff's Ex. 8). The record also shows corroborative testimony of the stenographer who took the dictation from Mr. Monfore. (R. 301-303).

Mr. McDiarmid's attempts to deny that he had made such a statement to Mr. Monfore were not very impressive (R. 186-188, 190-191), and it certainly was within the trial court's discretion to place little credence in Mr. McDiarmid's testimony.

An unexpected twist to this entire episode came near the end of the trial when Mr. Paskey Dedomenico testified on cross-examination that *he would have given the inspectors permission to inspect the plant, had he been there on July 18 and 19.* (R. 292-293). He had of course granted such permission on July 31 at the time of the second inspection. (R. 291-292).

We submit that the evidence to support the

Court's ruling that Mr. McDiarmid was the plant custodian on July 18 and 19 is not insubstantial.

Appellants cite *U. S. v. Maryland Baking Co.*, (N.D. Ga., 1948), 81 F. Supp. 560, to support their argument that Mr. McDiarmid was not the custodian. Whether Mr. McDiarmid was the custodian was a question of fact necessarily dependent upon the evidence *in the present case.* But the *Maryland Baking Co.* case was argued and considered at great length in the Court below. Clearly, it is distinguishable.

Briefly, the facts in that case were that when the inspectors came to the plant of the Maryland Baking Co., the manager, Miss Piem, was present but in conference. The inspectors then asked for the person next in authority and were directed to the plant superintendent who told them to "go ahead." The Court stated at page 562:

> "Under the evidence in this case, Miss Piem was the operator and custodian. *She was present and this was known to the agents. When present, she was the proper person* of whom to first request and obtain permission for the inspection . . ." (Italics added).

In the case at bar, Mr. Dedomenico was not present.

In appraising the fallacy in appellants' position, it is also important to note how extensive is the scope of investigational authority vested in the Secretary

of Health, Education, and Welfare[9] by the Federal Food, Drug, and Cosmetic Act. The basic provision is 21 U.S.C. 372(a) which reads in part:

> "*Secretary is authorized to conduct examinations and investigations for the purposes of this chapter through officers and employees of the Department* or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department." (Italics added).

In another connection, this Court has had occasion to comment on the breadth of this subsection. *Research Laboratories, Inc. v. U. S.*, (C.A. 9, 1948), 167 F. (2d) 410, 414, cert. den. 335 U.S. 843.

While 21 U.S.C. 372(a), (b), and (c), spell out the Secretary's fundamental authority to conduct investigations and examinations, there are other provisions in the law which also deal with investigations and which serve special purposes.

For example, 21 U.S.C. 373 requires that

---

[9] This Act was until recently administered by the Federal Security Agency under the supervision of the Federal Security Administrator. On April 11, 1953, pursuant to Reorganization Plan No. 1 of 1953 and 67 Stat. 18, the Federal Security Agency was abolished and the Department of Health, Education, and Welfare established to administer the functions formerly in the said Agency under the supervision and direction of the Secretary of that Department. (18 Fed. Reg. 2053).

carriers engaged in interstate commerce and persons who receive foods, drugs, devices, or cosmetics in interstate commerce, permit food and drug inspectors, duly designated by the Secretary, to copy records of interstate movement. The manifest purpose that such records be made available to inspectors at reasonable times is implemented by 21 U.S.C. 331(e) which makes it a prohibited act punishable under 21 U.S.C. 333 to refuse to permit such investigation. But Section 373 does not limit the Government's source of information as to records of interstate shipment. Thus, in a seizure action, *U. S. v. 75 Cases * * * Peanut Butter*, (C.A. 4, 1944), 146 F. (2d) 124, cert. den. 324 U.S. 856, the Government's evidence regarding interstate shipment was deemed admissible though the inspector had obtained the data by inspecting the manufacturer's invoice records (with permission) rather than records of an interstate carrier. On Page 127, the Court said:

> "In connection with Section 373 of the Act, there is no ground for the application of the maxim expressio unius est exclusio alterius. *We interpret this section, rather as affording a cumulative procedure to the Government, without restricting other avenues of information.* Nor are we impressed by the statement of claimant's president (who, without any remonstrance or protest, gave Rankin free access to the invoices) that he would not have granted this access if he had not thought Rankin had a legal right to such

> access or if he had known that the information thereby gleaned might be used in subsequent libel proceedings. *Permission to inspect the invoices was still voluntary and the Government was free to use this information in the proceedings for libel.*" (Italics added).

And at page 128, the Court observed:

> "There is no legal merit in the contention that the Administration must use other and more expensive and time consuming methods of investigation *instead of using information voluntarily given* . . . The Administration is not indulging in a game of 'hide and seek'. Its efforts are expended in the protection of the public." (Italics added).

In a similar way, we submit, Section 374, as it was effective in 1951, afforded a cumulative but not an exclusive procedure for obtaining factory inspection evidence. Section 374 in conjunction with Section 331(f) delineated a special procedure intended[10] to

---

[10] In *U. S. v. Cardiff*, 344 U.S. 174 (1952), affirming the decision of this Court in *Cardiff v. U. S.*, 194 F. (2d) 686, the Court ruled that under the statutory language it was not a criminal offense to refuse to grant permission for food and drug inspectors to enter and inspect a factory. But this ruling does not vitiate our argument here. It is one thing for a factory owner to be immune from criminal prosecution for refusal to grant permission to inspect. It is another for the Government to use as evidence data freely obtained in the course of a factory inspection for which permission was voluntarily given by the sales manager who was held out as "in charge of the plant" in the absence of the general manager. (R. 79).

compel the granting of permission to make factory inspections. But the general authority to investigate which stems from Section 372 permits the gathering and using of *any* information freely and voluntarily given. Where such information is obtained, as here, with the permission of a responsible representative of the firm and without any fraudulent or other improper methods, we submit it is admissible in any enforcement action where it is relevant; nor is it necessary in such case to have a meticulous determination that the person who gave the permission to inspect was the "owner, operator, or custodian."[11]

Appellants speak of Mr. McDiarmid's granting of permission as a violation of the corporation's right against self-incrimination. But it is no longer open to question that a corporation has no such privilege. *U. S. v. White*, 322 U.S. 694, 699 (1944); *Bowles v. Northwest Poultry & Dairy Products Co. et al.*, (C.A. 9, 1946), 153 F. (2d) 32, 34.

Appellants seem to argue that the factory inspection evidence, even if admissible, is not closely enough related in time to the manufacturing and shipping dates. (Appellants' Br. 27-31). The outside range of

---

[11] The manifest purpose of these terms in the original section 374 was to designate who might be prosecuted under Section 331(f) for failure to grant permission.

manufacturing dates extends from June 17 through July 26; the outside range of *shipping* dates extends from July 16 through July 26. (Appellants' Br. 2-3). It was reasonable to infer that the conditions which the inspectors observed on July 18 and 19 and on July 31 had prevailed at least for many weeks. This inference is based both on the testimony of the employees of the firm regarding insanitary conditions during June and July 1951, and on defendants' own evidence showing the usual life cycle of the flour moth to be about 9 weeks. (Defendants' Ex. A-2, page 4.)

In *Triangle Candy Co. v. U. S.*, (C.A. 9, 1944), 144 F. (2d) 195, 199, this Court sustained a finding of uncleanliness at a candy factory where the inspectors had observed insanitary conditions at the plant "at times not far removed from the date of manufacture of the candy."

In *Berger v. U. S.*, (C.A. 8, 1952), 200 F. (2d) 818, 823, the Court said at pages 823-824:

> "There is no dispute that the shipments involved in Counts One and Two were made on May 3 and May 17, 1951, respectively. The evidence describing the conditions on May 21, 22, and 23, in some particulars justified an inference that those conditions had existed for a considerable period of time. But there was additional and more direct evidence of what the conditions were in the plant at the time the shipments in question were canned and shipped. The analysis of

> the contents of the seized shipments showed that the jars contained, in addition to pickle relish, fragments of a fly skin, part of a fly's leg, a number of mites, part of a beetle wing, a moth scale, fragments of feathers and fragments of rodent hair. The evidence was not insufficient to support the verdict."

Here, too, as we have shown, the moth contamination in the finished products was directly correlated with the moth infestation at the plant. Note also *U. S. v. 44 Cases . . . Viviano Spaghetti, etc.*, (E.D. Ill, 1951), 101 F. Supp. 658, 662-663, where the Court ruled that insanitary factory conditions observed on October 11, 13, and 16, 1950, had prevailed on September 8, September 30, and October 9, 1950, when the products there in question were shipped interstate.

We submit that the trial court had ample reason to conclude that the inspectors in this case had acted with every circumspection and courtesy, that their testimony was completely honest and unbiased, that they were highly competent observers, and that their testimony was directly relevant to the issues of the case and admissible.

D. 21 U.S.C. 342(a) (4), WHICH DECLARES A FOOD TO BE ADULTERATED IF IT IS PREPARED, PACKED, OR HELD UNDER INSANITARY CONDITIONS WHEREBY IT MAY HAVE BECOME CONTAMINATED WITH FILTH, IS NOT VOID FOR UNCERTAINTY.

Appellants challenge the constitutionality of 21 U.S.C. 342(a) (4). (Appellants' Br., 15-26). This issue was neither presented to nor passed upon by the trial court, nor was it included in the "Statement of Points Upon Which Appellants Intend to Rely." (R. 312-315). Such questions will ordinarily not be considered on appeal. *Hoyt v. Clancey*, (C.A. 8, 1950), 180 F. (2d) 152, 154; *Rogers v. Union Pac. R. Co.*, (C.A. 9, 1944), 145 F. (2d) 119, 127; *Lyons v. U. S.*, (C.A. 6, 1941), 123 F. (2d) 507, 508.

On the merits, however, this very question was thoroughly considered in the case of *Berger v. U. S.* (C.A. 8, 1952), 200 F. (2d) 818, which upheld the constitutionality of Section 342(a) (4). We quote at some length the cogent language of this opinion:

Pages 821-822

> "It is clear that the congressional intent is to make it a criminal offense for a person to prepare, pack or hold food under such insanitary conditions that it may become contaminated. It is not necessary that it actually become contaminated. Stated in the language of Chief Justice

Stone in *Corn Products Refining Co. v. Federal Trade Commission,* 324 U.S. 726, 738, 65 S.Ct. 961, 967, 89 L.Ed. 1320, the statute is designed to prevent adulterations 'in their incipiency' by condemning insanitary conditions which *may* result in contamination.

"It is clear from an examination of *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 34 S.C. 337, 58 L. Ed. 658; *Standard Fashion Co. v. Magrane-Houston Co.* 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653, and *Corn Products Refining Co. v. Federal Trade Commission,* supra, that the clause—'whereby it may have become contaminated'—is not to be construed to mean that criminality may be predicated upon proof of an insanitary condition which gives rise to a 'mere possibility' of contamination. The condition condemned by the statute, which must be proved to support a conviction, is one which would with reasonable possibility result in contamination. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46, 68 S.Ct. 822, 92 L.Ed. 1196. Such construction placed upon the words 'which may render such articles injurious to health' resulted in the statute being impervious to attack on constitutional grounds. *United States v. Lexington Mill & Elevator Co.*, supra. This is also true of the statute now under consideration.

* * *

"It is contended that because the statute leaves open for determination the *degree* of insanitation which would possibly or probably result in contamination, it does not meet the test of definiteness. Or, as the argument was put in *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 781, 57 L. Ed. 1232, estimates of the degree of dirtiness and lack of sanitation which would probably or with reasonable possibility bring about the prohibited result might differ and a

man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. But the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. The criterion of criminality is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.

* * *

"The argument is advanced that the statute is void for indefiniteness and uncertainty because it contains no definition of 'insanitary conditions' and without such a definition no intelligent person can tell in advance when a condition violates the statute. We do not agree. The terms 'insanitary conditions' and 'contaminated' are descriptive terms commonly used and understood. True, there are degrees of insanitary conditions, some worse than others. And there are degrees of contamination. But both define a condition. And as as heretofore demonstrated, the fact that a statute contains in its definition an element of degree as to which estimates may differ does not result in unconstitutional indefiniteness or uncertainty. When the terms 'insanitary conditions' and 'contaminated' are read with the qualifying word 'filth', all become possessed with a more definite meaning. Impossible standards of specificity are not required. *Jordan v. DeGeorge*, supra. It is difficult to think of a more apt way to say that one should not prepare food under conditions whereby it would probably be filthy. Any reasonably intelligent person should know what that means. The statute is not subject to this attack."

The *Berger* case refers to *U. S. v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914), where the

Supreme Court interpreted a provision in the Food and Drugs Act of 1906 which declared a food to be adulterated "If it contains any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*" (Italics added). The Court said at page 411:

> "It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word 'may' is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, 'an auxiliary verb, qualifying the meaning of another verb, by expressing ability . . . contingency or liability, or possibility or probability.' . . . If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the Act. *This is the plain meaning of the words* . . . (Italics added)."

Appellants argue that the words "insanitary conditions" are uncertain so that they would have to guess as to their meaning. (Appellants' Br. 23-24). Then they seek to implement this argument by referring to the testimony of Mr. Morris J. Hubert of the

Quartermaster Corps who thought the conditions at the plant were sanitary. But Mr. Hubert was not a sanitary inspector. (R. 265). His duties were to go to the plant, obtain samples of finished products, and check the markings and packaging of the products. (R. 263). He testified that at the plant "we always look around," but he did not make an inspection even for the purpose of determining whether there was anything oustandingly wrong with respect to sanitation. (R. 265). His testimony that the plant was sanitary was properly ordered stricken and this ruling is not challenged here. (R. 265-266).

That appellants fall back on the testimony of Mr. Hubert in an effort to show differences "even among men who are experts in the field of sanitary inspection" (Appellants' Br. 24) is indicative of the thinness of their argument.

Certainly, the live and dead moth infestation at the plant, in various stages of development such as larvae, pupae, webbing, and adult moths—in the flour storage bins, on the walls, in the flour conveying machinery, in the drying room and on the drying trays, in the enrichment tank, and in direct contact with the food—comprised insanitary conditions whereby the food might have become contaminated with filth.

It is clear that the statutory language attacked

by appellants sets up a standard of cleanliness in food manufacturing plants sufficiently definite for any reasonable person to avoid offending its requirements.

E. MISCELLANEOUS POINTS.

1. The Individual Defendant Was Criminally Responsible

Appellants assert that the individual defendant, Paskey Dedomenico, was not physically present at the plant when the shipments in question were made, and they urge that he cannot be held responsible for those shipments. (Appellants' Br. 50-63).

Mr. Dedomenico was president of the corporation (Golden Grain Macaroni Co.) and general manager of its Seattle plant. (R. 23; 284). He was the final authority and in over-all charge of the plant, including shipping, sales, and production, and he spent the major part of his time there. (R. 295).

On June 28, 1951, he left for San Francisco and he returned on July 25. (R. 284). It may be noted that the cut macaroni involved in Count 2 was manufactured and packed during the week of June 17-23, 1951 (Appellants' Br. 2), *before Mr. Dedomenico left for San Francisco.* Samples of this cut macaroni, identified as No. 30-340 L and examined by chemists for both sides, revealed more serious contamination than most of the other samples. (See Appendices A and B).

The elbow macaroni involved in Count 5 and the thin spaghetti involved in Count 6 were manufactured and packed during the week of July 22, 1951, and they were shipped on July 26 (Appellants' Br. 3), *the day after Mr. Dedomenico returned.* Mr. Elliott's analysis of the thin spaghetti, Sample No. 29-478 L, showed that this shipment had the largest count of insect and larva fragments. (Appendix A).

But it is settled that the criminal responsibility of a corporate officer or general manager of a firm does not hinge upon his physical presence or participation in the violative acts. *U. S. v. Dotterweich,* 320 U. S. 277, 281-285 (1943); *U. S. v. Kaadt et al.,* (C.A. 7, 1948), 171 F. (2d) 600, 604; *U. S. v. Parfait Powder Puff Co.,* (C.A. 7, 1947), 163 F. (2d) 1008, 1009-1010, cert. den. 332 U.S. 851.

In the *Dotterweich* case, Dotterweich was the president and general manager of the Buffalo Pharmacal Co., Inc. Both Dotterweich and the corporation were prosecuted under the Federal Food, Drug, and Cosmetic Act for the interstate shipment of adulterated drugs. Dotterweich was convicted but the jury disagreed as to the corporation. The opinion of the Court of Appeals [*U. S. v. Buffalo Pharmacal Co., Inc.,* (C.A. 2, 1942), 131 F. (2d) 500] sets forth the facts more fully. On page 501, the Court of Appeals said:

"*The appellant Dotterweich had no personal connection with either shipment,* but he was in general charge of the corporation's business and had given general instructions to its employees to fill orders received from physicians." (Italics added).

While the Court of Appeals felt that Dotterweich's conviction could not be upheld, the Supreme Court reversed and sustained the conviction. We quote some of the language in the Supreme Court's opinion:

320 U.S. 280

"The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."

320 U.S. 281

"Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger."

320 U.S. 284-285

"To speak with technical accuracy, under §301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence

> produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrong-dong be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."

We submit that here, as in the *Dotterweich* case, there was sufficient evidence to support the trial court's conclusion as to the criminal responsibility of the individual defendant.

2. Appellants Were Not In Double Jeopardy

The food involved in Count 3 is elbow macaroni. The food involved in Count 4 is spaghetti. Both of these foods were shipped to the same consignee on the same date and under the same bill of lading. Appellants contend that the interstate movement of these two foods comprises but one offense and they seem to argue that their conviction on both Counts is "double jeopardy." (Appellants' Br. 30-35). A similar contention is made with respect to Counts 5 and 6.

This issue was neither presented to nor passed upon by the trial court, nor was it specified in the "Statement of Points Upon Which Appellants Intend to Rely." Under such circumstances, the appellate court will generally not consider the question. (See the authorities cited for the same proposition at the outset of Part D of this Argument). Moreover, it would appear that appellants have waived whatever rights they may have had in this respect. In *Levin et al. v. U. S.*, (C.A. 9, 1925), 5 F. (2d) 598, cert. den. 269 U. S. 562, this Court said at page 600:

> "It is uniformly held that the constitutional immunity from second jeopardy is a personal privilege, which may be waived, that the waiver may be either express or implied, that it is always implied when there is failure to raise the objection at the first opportunity, and that it comes too late when raised for the first time on motion in arrest of judgment."

See also *U. S. v. Coy*, (W.D. Ky., 1942), 45 F. Supp. 499, 501, and cases there cited. And in *Brewster v. Swope*, (C.A. 9, 1950), 180 F. (2d) 984, 986, this Court suggested that an accused waives his right to claim double jeopardy when he files a motion for a new trial. Appellants here also filed a Motion for a New Trial. (R. 308).

However, on the merits, we turn first to the statute:

"21 U.S.C. 331. Prohibited Acts

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of *any* food, drug, device, or cosmetic that is adulterated or misbranded." (Italics added).

Thus it is clear the statute forbids the introduction of *any* adulterated food into interstate commerce.

The adulterated food referred to in Count 3 was elbow macaroni. The adulterated food referred to in Count 4 was spaghetti. Obviously, these are two separate foods, each having a characteristic size and shape, and each requiring special manufacturing and drying equipment. Thus, spaghetti is dried on sticks while elbow macaroni is dried on trays. (R. 66-67).

Moreover, separate proof was required and was produced to establish the alleged violative character of each food. (Note Appendices A and B showing that both chemists made separate analysis for each food). It is our contention that the introduction of each of these separate foods into interstate commerce in an adulterated condition constituted a separate offense, and that it was immaterial whether they were shipped at the same time, on the same bill of lading, and to the same consignee.

In *Berg v. U. S.*, (C.A. 9, 1949), 176 F. (2d) 122, cert. den. 338 U. S. 876, the defendant was convicted on seven counts of making false entries in records kept by a common carrier. Separate sentence was imposed on each count. Each count dealt with a separate false entry, but at least six of the seven false entries were made in the same report. (See opinion of District Court, 79 F. Supp. 1021). Rejecting appellant's argument that there was but one offense, this Court said at pages 125-126:

> "The falsification of the several entries was punishable in each instance as a separate crime. Each entry required proof of additional facts, in order to establish the separate crime, whether made on the same report or different reports."

Note also *Bower v. U. S.*, (C.A. 9, 1924), 296 Fed. 694, cert. den. 266 U.S. 601, where this Court sustained another "false entry" conviction, stating on pages 695-696:

> "The statute prohibits the making of any false entry, not the making of a false report, and each false entry constitutes a separate and distinct crime, even though the several entries are made on the same day and contained in the same statement or report."

The analogy to the instant case is manifest. Section 331 (a) prohibits the introduction of any adulterated food into interstate commerce, *not the introduction of any shipment of adulterated foods.*

The precise question as to the number of offenses that may arise under the Federal Food, Drug, and Cosmetic Act of 1938 out of one shipment of different items has not, to our knowledge, been discussed in any reported opinion. [11A] Under the Food and Drugs Act of 1906, however, there were two cases which dealt with this point.

In *U. S. v. Direct Sales Co.* (S.D. N.Y., 1918), 252 Fed. 882, the defendant was charged in 14 Counts with making one interstate shipment of seven different drugs, each alleged to be both adulterated and misbranded. Upon conviction, defendants contended there was but one offense and there should be but one penalty. The statute then before the Court read in part:

> "Any person who shall ship * * * any such article so adulterated or misbranded * * * shall be guilty of a misdemeanor * * *"

The trial court held there were 14 offenses, stating at page 883:

> "According to this (statute), the article is clearly specified as the unit of the offense, as

---

[11A] But note *Barnes et al v. U. S.*, (C.A. 9, 1944), 142 F. (2d) 648, where this Court sustained the conviction and imposition of separate penalties on Counts 3 and 4 of an information though both Counts related to a single consignment of tablets which were both adulterated and misbranded.

> distinguished from the shipment, and as there were seven different articles in the shipment, and each was both adulterated and misbranded, it would seem that there were fourteen separate and distinct violations of the act, for which separate penalties may be imposed."

On the other hand, in *U. S. v. Watson-Durand-Kasper Grocery Co.*, (D. Kans., 1917), 251 Fed. 310, the Court ruled that a seven-count Information regarding the interstate shipment of 250 pails of adulterated "confectionery" spelled out but one offense. The facts are not entirely clear. While there is some reference to the candy being "variously labeled," there seems to have been but one shipment of *one food* —namely, confectionery.

Appellants seem to suggest that in a seizure action under 21 U.S.C. 334(a) to condemn adulterated macaroni and adulterated spaghetti that were shipped at the same time, the Court would make no distinction between the two products and would condemn both though the Government's proof established only that the macaroni was adulterated. (Appellants' Br. 34). This is absurd on its face. Appellants cite *A. O. Andersen & Co. v. U. S.*, (C.A. 9, 1922), 284 Fed. 542 and *U. S. v. 935 Cases * * * Tomato Puree,* (N.D. Ohio, 1946), 65 F. Supp. 503. Neither of these cases supports appellants' proposition.

In the *Andersen* case, there was only *one food*

under seizure—canned salmon. This Court's common sense ruling was that the Government did not have to open every can of salmon to prove that the entire lot should be condemned.[12] A representative sampling would be sufficient.

The *Tomato Puree* case also involved but *one food* and the Court's ruling was similar to that in the *Andersen* case.

We submit that even if the double jeopardy question were properly before this Court, there is no basis for appellants' position since each Count involved a separate food.

3. The Fines Imposed Are Within the Statutory Limits and Not Subject to Attack On Review

The trial court sentenced the corporate defendant to pay a fine of $5000. (R. 14). The individual defendant was also sentenced to pay a fine of $5,000 and then was placed on probation with respect to imposition of sentence as to imprisonment. (R. 15-16).

Appellants now say that "*the fine is so excessive* as to indicate abuse of discretion on the part of the trial judge." (Appellants' Br. 64-65). Presumably, appellants refer to both fines.

---

[12] Obviously, if the Government opened every can before trial, there would remain no *res* over which to litigate.

The applicable rule relating to appellate review of the sentence imposed by the trial court is clear. In *Tomoya Kawakita v. U. S.*, (C.A. 9, 1951), 190 F. (2d) 506, aff'd 343 U.S. 717—where the death sentence had been pronounced—this Court said at page 528, citing many authorities:

> "No legal error is committed in imposing a severe sentence so long as it does not exceed the maximum set by statute."

In the instant case, defendants had been previous convicted under the Federal Food, Drug and Cosmetic Act for the interstate shipment of food adulterated within the meaning of Section 342(a) (4) in that it had been prepared, packed, and held under insanitary conditions whereby it may have become contaminated with filth. (Plaintiff's Ex. 27). Because of such prior conviction, the maximum penalty which could have been imposed for each offense was "imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine." [21 U.S.C. 333(a)].

Each defendant here was convicted on five counts which, as we have demonstrated, specified five separate offenses. Consequently, each defendant was subject to a total maximum fine of $50,000. In view of the prior conviction and the scope of defendants' operations—which was known to the Court not only

from the testimony but also from the visit which the Court made to the plant at defendants' request (R. 282)—, it cannot seriously be urged that a fine of $5,000 on each defendant, one-tenth of the maximum, was excessive. Certainly, the fine imposed was well within the statutory maximum.

Defendants had obviously been making only a stab at sanitation by imposing clean-up duties on employees heavily burdened with their regular work. (R. 68). By sentencing defendants as it did, the Court hoped to focus attention on the need "to employ a man solely for the purpose of guarding against these conditions. They simply did not keep their house in good order." (R. 304).

4. The Trial Court Committed No Error in Its Rulings On the Filth Question

Appellants complain that the trial court refused "to admit testimony" and "to consider argument on the question 'What is filth'." (Appellants' Br. 49-50, 42-43).

But appellants do not point to any instances where the court excluded *competent testimony* regarding the meaning of filth or the presence of filth in their premises and products. In fact, defense counsel was permitted a wide scope of interrogation on these very points. (R. 165; 243-244; 275-276; 278).

As the basis for their complaint, appellants point to that place in the Record where the trial court interrupted defense counsel's argument on the motion for acquittal at the close of the Government's case in chief. (R. 181-182; Appellants' Br. 42-43). There, counsel was arguing a question of law as to the meaning of the term "filth." The trial court was fully informed on this legal point and stated it did not care to hear further argument on it. The Court also remarked that "filth is to be taken in its ordinary accepted term," citing *U. S. v. Lazere*, 56 F. Supp. 730 (R. 181). Since appellants agree that this is the correct interpretation of the word (Appellants' Br. 39), there was and is no room for argument.

The scope of argument on questions of law is wholly discretionary with the trial court. As was observed in *State v. Meyers*, (Sup. Ct. Oregon, 1910), 110 Pac. 407, 410:

> "If the court thought itself sufficiently advised as to the law, it had the right to refuse to hear counsel further."

VII

CONCLUSION

For the foregoing reasons, the Judgments of the District Court should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney
Attorney for Appellee

J. CHARLES DENNIS
Of Counsel

ARTHUR A. DICKERMAN,
Attorney

APPENDIX A

ANALYTICAL FINDINGS OF ROBERT T. ELLIOTT

Count No.	Name of Food	Sample No.	Amount of Sample Used	Findings	Record Reference
2	Cut Macaroni	30-340 L	3 lbs.	62 larva or insect fragments, moth scales rodent-hair fragments....	156
3	Elbow Macaroni	29-871 L	2 lbs.	24 insect or larva fragments, 1 larva capsule (part remaining from head of a worm), 1 insect egg, moth scales....	156-157
4	Spaghetti	29-872 L	1 lb.	14 insect or larva fragments, moth scales.....	158
5	Elbow Macaroni	29-477 L	3 lbs.	17 insect or larva fragments, 1 small rodent hair, moth scales.....	158-159
6	Thin Spaghetti	29-478 L	3 lbs.	70 insect or larva fragments, 1 larva capsule, 1 rodent hair moth scales.....	159-160

APPENDIX B

ANALYTICAL FINDINGS OF JOHN SPINELLI

Count No.	Name of Food	Sample No.	Amount of Sample Used	Findings**	Record Reference
2	Cut Macaroni	30-340 L	½ lb.*	6 insect fragments, couple of pieces of larvae, some gritty particles	235
3	Elbow Macaroni	29-871 L	½ lb.	8 insect fragments mold	236-237
4	Spaghetti	29-872 L	½ lb.	3 insect fragments.....	237
5	Elbow Macaroni	29-477 L	½ lb.	5 insect fragments some gritty particles....	237
6	Thin Spaghetti	29-478 L	½ lb.	5 insect fragments some particles of grit..	239, 237

* Mr. Spinelli stated he examined 225 grams from each sample. This is slightly less than ½ lb.

** Mr. Spinelli testified, without identifying the particular sample, that he found a moth scale or part of a moth in one sample. (R. 259).

APPENDIX C

Public Law 217 — 83rd Congress

Chapter 350 — 1st Session

H. R. 5740

AN ACT

To amend the Federal Food, Drug and Cosmetic Act, so as to protect the public health and welfare by providing certain authority for factory inspection, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 704 of the Federal Food, Drug, and Cosmetic Act, as amended (21 U. S. C., sec. 374) is amended to read as follows:

Federal Food, Drug, and Cosmetic Act, amendments. 52 Stat. 1057. 67 Stat. 476. 67 Stat. 477.

"FACTORY INSPECTION

"Sec. 704. (a) For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or

hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

"(b) Upon completion of any such inspection of a factory, warehouse, or other establishment, and prior to leaving the premises, the officer or employee making the inspection shall give to the owner, operator, or agent in charge a report in writing setting forth any conditions or practices observed by him which, in his judgment, indicate than any food, drug, device, or cosmetic in such establishment (1) consists in whole or in part of any filthy, putrid, or decomposed substance, or (2) has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health. A copy of such report shall be sent promptly to the Secretary.

"(c) If the officer or employee making any such inspection of a factory, warehouse, or other establishment has obtained any sample in the course of the inspection, upon completion of the inspection and prior to leaving the premises he shall give to the owner, operator, or agent in charge a receipt describing the samples obtained.

"(d) Whenever in the course of any such inspection of a factory or other establishment where food is manufactured, processed, or packed, the officer or employee making the in-

spection obtains a sample of any such food, and an analysis is made of such sample for the purpose of ascertaining whether such food consists in whole or in part of any filthy, putrid, or decomposed substance, or is otherwise unfit for food, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge."

Sec. 2. Section 301 of such Act (21 U.S.C., sec. 331) is amended by 52 Stat. 1042, adding at the end thereof the following new paragraph:

Use of reports or analysis

"(n) The using, in labeling, advertising or other sales promotion of any reference to any report or analysis furnished in compliance with section 704."

Sec. 3. Section 304 (c) of such Act (21 U.S.C., sec. 334) is amended (52 Stat. 1045) to read as follows:

PUBLIC LAW 217

All 67 Stat. 477. *Seized Goods. Sample.*

"(c) The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized and a true copy of the analysis, if any, on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained."

Approved August 7, 1953.